

No. 92-74-CFX  
Status: GRANTED

Title: Department of Revenue of Oregon, Petitioner  
v.  
ACF Industries, Inc., et al.

Docketed:  
July 7, 1992

Court: United States Court of Appeals for  
the Ninth Circuit

Counsel for petitioner: Linder, Virginia L.

Counsel for respondent: McBride, James W., Phillips, Carter G.

Ptn mailed July 7; recd July 9, 1992

Entry	Date	Note	Proceedings and Orders
1	Jul 7 1992	G	Petition for writ of certiorari filed.
2	Aug 6 1992	G	Motion of Multistate Tax Commission for leave to file a brief as amicus curiae filed.
3	Aug 6 1992		Brief of respondents AFC Industries, et al. in opposition filed.
4	Aug 6 1992		Brief amici curiae of Washington, et al. filed.
5	Aug 12 1992		DISTRIBUTED. September 28, 1992
6	Aug 20 1992	G	Motion of Multistate Tax Commission for leave to file an amended brief as amicus curiae filed.
7	Oct 5 1992		Motion of Multistate Tax Commission for leave to file a brief as amicus curiae GRANTED.
8	Oct 5 1992		Motion of Multistate Tax Commission for leave to file an amended brief as amicus curiae GRANTED.
10	Oct 5 1992		REDISTRIBUTED. October 9, 1992
11	Oct 13 1992	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
12	Apr 19 1993		Brief amicus curiae of United States filed.
13	Apr 21 1993		REDISTRIBUTED. May 14, 1993
14	May 7 1993	X	Brief of respondents in response to amicus brief submitted by the Solicitor General filed.
15	May 17 1993		Petition GRANTED. *****
17	Jun 24 1993		Order extending time to file brief of petitioner on the merits until July 15, 1993.
18	Jul 15 1993		Brief amici curiae of National Conference of State Legislatures, et al. filed.
19	Jul 15 1993		Joint appendix filed.
20	Jul 15 1993		Brief of petitioner Department of Revenue of the State of Oregon filed.
22	Jul 15 1993		Brief amicus curiae of California filed.
23	Jul 15 1993		Brief amici curiae of Washington, et al. filed.
24	Jul 15 1993		Brief amicus curiae of Iowa filed.
25	Jul 15 1993		Brief amicus curiae of United States filed.
21	Jul 16 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Aug 3 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
29	Aug 16 1993		Order extending time to file brief of respondent on the

No. 92-74-CFX

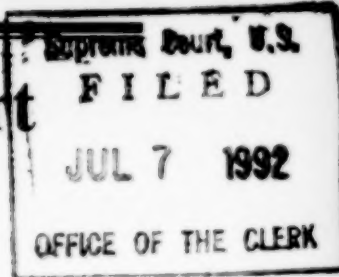
Entry	Date	Note	Proceedings and Orders
			merits until September 2, 1993.
30	Aug 16 1993		Record filed.
		*	Original proceedings United States District Court for the District of Oregon. (BOX)
31	Aug 31 1993		Brief amici curiae of Alaska Airlines, Inc., et al. filed.
32	Sep 2 1993		Brief amici curiae of Railway Progress Institute, et al. filed.
33	Sep 2 1993		Brief amicus curiae of Association of American Railroads filed.
34	Sep 2 1993		Brief of respondents ACF Industries, et al. filed.
35	Sep 8 1993		CIRCULATED.
36	Sep 10 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 8, 1993. (2ND CASE).
37	Sep 24 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
38	Oct 4 1993	X	Reply brief of petitioner filed.
39	Nov 8 1993		ARGUED.



02-74

**In the Supreme Court  
of the United States**

OCTOBER TERM, 1992



DEPARTMENT OF REVENUE OF THE  
STATE OF OREGON, RICHARD A. MUNN,  
in his Capacity as Director of the Department  
of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL  
AMERICAN TRANSPORTATION CORPORATION;  
GENERAL ELECTRIC RAILCAR SERVICES  
CORPORATION, PULLMAN LEASING  
COMPANY; RAILBOX COMPANY; RAILGON  
COMPANY; TRAILER TRAIN COMPANY;  
UNION TANK CAR COMPANY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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### **QUESTIONS PRESENTED**

(1) Whether a State imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, the Department of Revenue of the State of Oregon, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *ACF Industries Inc., et al. v. Dept. of Revenue of the State of Oregon*, No. 90-35402 (April 8, 1992).

## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *ACF Industries Inc., et al. v. Dept. of Revenue of the State of Oregon*, 961 F.2d 813 (1992), and is attached to this petition as Appendix A. The district court's opinion is unreported, and is attached to this petition as Appendix B.

## JURISDICTION

The court of appeals' opinion was dated and filed on April 8, 1992. The judgment was entered the same day, and this petition is filed within 90 days. Jurisdiction to review the judgment by writ of certiorari is conferred upon the Court by 28 U.S.C. § 1254(1)(1982). The district court had jurisdiction over the claim in the first instance under the provisions of 49 U.S.C. § 11503(c).

## STATUTES INVOLVED

49 U.S.C. § 11503, the Railroad Revitalization and Regulatory Reform Act of 1976, provides, in pertinent part:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail

transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

"Commercial and industrial property" is defined in 49 U.S.C. § 11503(a)(4) as:

property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax.

The complete text of of 49 U.S.C. § 11503 is set out in Appendix C.

### STATEMENT OF THE CASE

1. After 15 years of "intermittent and inconclusive legislative action," Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act") to restore the financial stability of the railway system.<sup>1</sup> From the beginning, proponents of the legislation identified state taxation of railroads as an area for reform. Specifically, Congress was urged to provide relief that would equalize the position of railroads *vis-a-*

<sup>1</sup> *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987).

*vis* other taxpayers in the same jurisdiction and *vis-a-vis* other interstate carriers.<sup>2</sup> Ultimately, as one small part of the massive 4R Act and as one of several means to achieve the Act's general goals, Congress enacted § 306 (now codified as § 11503) to address directly the problem of discriminatory state taxes.<sup>3</sup> See generally *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457-59 (1987).

Under § 11503, Congress has declared that specific taxing acts "unreasonably burden and discriminate against interstate commerce" and that the States may not engage in any of those acts. For the most part, the prohibited acts are directed to rate and assessment discrimination in the States' ad valorem property tax schemes. Specifically, the section forbids States to assess property (both real and personal) at a higher fraction of fair market value than they assess other "commercial and industrial property" (§ 11503(b)(1)); to levy or collect a tax based on such an assessment (§ 11503(b)(2)); and to tax rail transportation

<sup>2</sup> See *Special Study Group on Transportation Policies in the United States*, S. Rep. No. 445, 87th Cong., 1st Sess. 463 (1961). This is often referred to as the "Doyle Report," and it proved to be the genesis for the 4R Act. The report recommended some form of an "antidiscrimination tax law."

<sup>3</sup> The provisions of original § 306 are set out in Appendix D. As this Court has observed, the language of § 306 was first codified at 49 U.S.C. § 26c. Congress altered the language slightly when the Act went into effect three years later (recodified as 49 U.S.C. § 11503). Congress specifically directed that any changes due to the recodification "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466. Most lower courts, accordingly, have concluded that ambiguities in the provision should be resolved in favor of the original language. See generally *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1568, n.1 (11th Cir. 1987) (discussing cases). This Court, too, has suggested that the original language should be controlling. See *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. at 459 n.1. But see *Arizona v. Atchison, Topeka & S.F. R. Co.*, 656 F.2d 398, 404 (9th Cir. 1981) (rejecting that approach where original language was dropped from recodification on theory that original language never became law and therefore cannot be construed).



property a higher rate than other "commercial and industrial property" (§ 11503(b)(3)). "Commercial and industrial property" thus forms the comparison class for purposes of testing ad valorem property taxes for rate or assessment discrimination. The class includes all property, except land used primarily for agricultural purposes or for growing timber, that is devoted to commercial and industrial uses and that is "subject to a property tax levy." § 11503(a)(4). A fourth and final provision of the Act prohibits discriminatory taxes in a less specific way: it forbids the States from imposing "any other tax" that discriminates against a rail carrier. § 306(1)(d); § 11503(b)(4). This subsection, unlike the others, does not specify what types of property or other taxes are to be compared in testing whether the treatment of railroad property is "discriminatory."<sup>4</sup>

2. The following description of Oregon's property tax system is taken largely from the Ninth Circuit's opinion and accurately describes its essential features. All real and personal property in Oregon, except property expressly exempted, is subject to ad valorem taxation and must be assessed and taxed "in equal and ratable proportion." Or. Rev. Stat. § 307.030 (1987). All personal property must be valued at 100 percent of its fair market value. Or. Rev. Stat. § 308.250 (1987). Oregon taxes railroad cars as "tangible personal property." Or. Rev. Stat. § 307.030 (1987).

Certain classes of business personalty are exempt from ad valorem taxation, including agricultural machinery and equip-

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<sup>4</sup> The original language of § 306 forbade the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this chapter." § 306(1)(d). The recodified language changed the reference to "any other tax" and it became "another tax." We consistently refer to the language from § 306 ("any other tax"). See fn.3, *infra*.

ment, business inventories, livestock, poultry, bees, fur-bearing animals and agricultural products in the possession of farmers. Or. Rev. Stat. §§ 307.325, 307.400 (1987). Motor vehicles are exempt from personal property taxation but are subject to fixed registration fees in lieu of property taxes. Or. Rev. Stat. § 803.585 (1987). Standing timber is also expressly exempt from ad valorem taxation, but it is taxed under a separate scheme when it is harvested. Or. Rev. Stat. §§ 307.010(1)(1987), 321.005 *et seq.* (1987).

3. Plaintiffs are a group of eight corporations, commonly known as "carlines," which are in the business of leasing railroad cars to railroad carriers. Carlines' property, both real and personal, is within the definition of "transportation property" that is subject to the protection of the 4R Act. The plaintiff carlines brought this action pursuant to the 4R Act seeking a declaration that Oregon's property tax scheme unlawfully discriminates against them because it exempts some categories of personal property (*e.g.*, business inventory and standing timber) without extending exemptions to the categories of personal property held by carlines. Carlines sought to enjoin Oregon from collecting any property taxes on their personal property. In pursuing their claim, carlines did not rely on subsections (b)(1)-(3), which are directed by their terms to discriminatory ad valorem property taxation. They sought relief instead under subsection (b)(4), the general provision prohibiting "any other tax" that discriminates against a rail carrier.<sup>5</sup>

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<sup>5</sup> At the district court level, the State disputed whether carlines qualified as "rail carriers" and thus had standing under subsection (b)(4) to challenge the State's taxes as discriminatory. The district court resolved that issue in favor of carlines and it may be considered settled for purposes of review at this level.

4. The district court entered judgment for the State after concluding that carlines did not meet their burden to show that Oregon's tax on railroads is discriminatory. The trial court characterized carlines' challenge as a claim that Oregon's exemptions (as opposed to its tax rates or assessments) discriminate against railroads. (App-31). In addressing that claim, the court canvassed analogous cases from other jurisdictions involving exemptions that are neutral in application and not directed to any particular class of taxpayer, but that instead exempt classes of property that the railroads do not happen to own. (App-29-31). The district court concluded that Oregon's system of exemptions similarly is neutral in application. (App-32). In reaching that conclusion, the court suggested that at some point a State's system of property tax exemptions might become "discriminatory" by exempting most classes of personal property while taxing classes of property typically owned only by railroads. (See App-32). The trial court held, however, that Oregon's tax system did not approach that critical threshold. *Ibid.*

5. The Ninth Circuit reversed. The court first concluded that the sections of the 4R Act that expressly address ad valorem taxes were irrelevant to carlines' challenge. (App-9-13). Under those sections, railroads may compare the tax treatment of their property only to the treatment of commercial and industrial property that is "subject to a property tax levy." As a result, wholly exempt property is outside the comparison class. The Ninth Circuit held, however, that by casting their claim as one directed to "discriminatory exemptions" rather than to discriminatory assessment ratios or rates, the carlines could bring their suit under § 11503(b)(4) (prohibiting "any other tax" that discriminates against rail carriers). Under that section, the Ninth Circuit observed, Congress did not limit the comparison class to

"commercial and industrial property." Accordingly, the court held that exempt property may freely "enter the equation" in testing a state's property tax for discriminatory treatment of railroads. (App-15-16).

The Ninth Circuit rejected, *sub silentio*, the district court's reliance on the neutrality of Oregon's exemptions. The appellate court implicitly deemed it irrelevant that Oregon exempts classes of property, some of which railroads may or may not own (*e.g.*, motor vehicles, inventory held for sale), rather than classes of taxpayer (*e.g.*, timber land owned by mills versus that owned by railroads). The Ninth Circuit found that at least 25% of all real and personal property in Oregon is tax-exempt. (App-18). The court, however, expressly disagreed with the district court's analysis that a State's property tax exemptions are not "discriminatory" unless the percentage of exempt property is high enough to suggest that railroads are targets of special taxation.<sup>6</sup> Instead, the court of appeals concluded that:

[A]ny exemption not also available to railroads violates the statute, with the possible qualification that a *de minimis* level of exemption available only to other taxpayers may not state a claim under section 306(1)(d).

(App-17).

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<sup>6</sup> The Ninth Circuit represented that the district court held and the State agreed that a 50% threshold should be used to determine the point at which the State's exemption system becomes "discriminatory." (App-16). That is an inaccurate interpretation of the State's position below: the State argued only that because total exemptions did not even approach a 50% level, any suggestion that Oregon's exemptions were discriminatory should not be entertained. Nor did district court adopt an absolute 50% threshold as a conclusive point to deem exemptions "discriminatory." The district court specifically declined to identify any single percentage as the test, and suggested instead that the question was whether the level of exemptions and the nature of the exemptions, alone or in combination, would support an inference that a State's tax was discriminatory. (App-32).



The court next turned to the question of remedy. The court declined to award the proportional relief that Congress provides under the ad valorem provisions of the Act. Under those subsections, railroads are entitled to have their tax rates or assessments adjusted to match the average tax on all commercial and industrial property in the jurisdiction. *See* discussion *infra* at p. 23-24. The Ninth Circuit held instead that carlines are entitled to the same total exemption "preferred property owners" enjoy. (App-19). The court enjoined Oregon's collection of any ad valorem tax on carlines' personal property. (App-19).

#### REASONS FOR GRANTING THE WRIT

The Ninth Circuit has announced a *per se* rule of discrimination that leads to an extraordinary encroachment on the States' authority to levy taxes. Under the Ninth Circuit's decision, a state property tax system that exempts *any* class of property not owned by a railroad without exempting *all* property held by that railroad is *per se* discriminatory within the meaning of the 4R Act. By virtue of the remedy the Ninth Circuit imposes, States necessarily are forced to one of two extreme positions: either they must restructure their property tax schemes to eliminate all property tax exemptions, or they must cease altogether to tax any property held by railroads.<sup>7</sup> The Ninth Circuit's decision permits no middle ground. In so holding, the court has overridden one of the significant compromises that Congress deliberately incorporated into § 11503 and has aggravated the developing conflict among lower courts that have grappled with the contours of the non-discrimination provisions of the 4R Act.

<sup>7</sup> The plaintiff Carlines sought relief only from taxation on their personal property. The rationale of the Ninth Circuit's decision is not limited to personal property and other lawsuits already filed in Oregon urge that the Ninth Circuit's holding applies to real property as well. *See* fn. 34, *infra*.

#### I

#### The Ninth Circuit's *Per Se* Rule Contradicts Both the Language and the History of the Statute

The Ninth Circuit's holding is predicated on subsection (b)(4), which forbids imposition of "any other tax" that discriminates against a railroad. The court read the prohibition as sufficiently broad and unrestricted in its terms to permit railroads to attack any aspect of any state tax as discriminatory. That construction might be at least plausible if subsection (b)(4) stood in isolation or was the sole provision directed to discriminatory state taxation. The subsection, however, is part of a larger fabric in which Congress carefully protected the States' authority to fully exempt some property from taxation without rendering their taxation schemes "discriminatory" within the meaning of § 11503.

Congress's intent is unmistakably reflected in subsections (b)(1) and (b)(3), which address ad valorem taxation specifically. Those subsections prohibit states from discriminating against railroads in either of two ways: by assessing railroad property at a higher percentage of true cash value than the percentage applied to commercial and industrial property; or by imposing a higher tax rate on the assessed value of railroad property than is imposed on commercial and industrial property. Congress specially defined "commercial and industrial property" to limit the relevant comparison class:

"[C]ommercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*.

49 U.S.C. § 11503(a)(4)(emphasis added).



One of the few areas in which lower courts interpreting § 11503 are in agreement is on the meaning of "subject to a property tax levy." Uniformly, they have concluded that the language means that railroads cannot base a claim of rate or assessment discrimination on a comparison that includes "exempt" property — that is, property a state does not tax at all. *See, e.g., Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1571-73 (11th Cir. 1987)(citing and discussing representative cases).<sup>8</sup> As the Ninth Circuit itself has held: "We find no authority requiring untaxed property to be included in an average of assessed value for taxed property." *ACF Industries v. Arizona*, 714 F.2d 93, 94 (9th Cir. 1983); *accord Clinchfield Railroad v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986)(dictum); *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509, 512 (N.D. Cal. 1982).

Congress's decision to exclude tax-exempt property from the comparison class was a significant one. In most instances, incorporating tax-exempt property in the rate or assessment calculations would create a measurable gap between the average tax treatment of commercial and industrial property and the tax on railroad property. Property that is not subject to an ad valorem tax is the equivalent of property taxed at a zero rate. Including it in the calculation necessarily would reduce the average tax rate for the comparison class of property. Similarly, exempt property is the equivalent of property that is assessed at zero percent of true cash value. Again, including tax-exempt

<sup>8</sup> The Eleventh Circuit's discussion of the "subject to a property tax levy" language is particularly thorough. The court went on to conclude that a claim under subsection (b)(4) may include an examination of exempt property (*see discussion infra* at p. 20), a conclusion we do not necessarily endorse in relying on the first portion of the court's analysis.

property in the comparison class would demonstrably lower the average assessment ratio. In both cases, the result likely would be that few, if any, State taxes on railroad property would survive challenge under subsections (b)(1) and (b)(3).<sup>9</sup> Thus, for Congress to have included tax-exempt property in the formula would have proven largely outcome determinative.

The exclusion of tax-exempt property from the class of property to which railroads may compare themselves was a conscious choice on Congress's part. In the course of the bill's evolution, Congress narrowed the comparison class in three ways. Congress specified that the rates and assessments applied to railroad property had to be on a par with those applied to property devoted to "a commercial and industrial use." Congress also eliminated from the formula all real property used for agricultural purposes or timber growing.<sup>10</sup> More important for purposes of this case, Congress specified that railroads could compare their

<sup>9</sup> A hypothetical illustrates the point. Assume, for example, that a State taxes real and personal property at a uniform rate of 4% of true cash value. Assume further that all taxed property in the State is assessed at 100% of its true cash value. In a comparison class consisting only of property subject to ad valorem taxes, a claim of discrimination would necessarily fail because both the tax rate and tax assessments are absolutely uniform.

Both the calculation and the result change, however, when tax-exempt property is included in the comparison class. Assume that 25% of all property in the state is exempt from ad valorem taxes. Effectively, then, 25% of the jurisdiction's property is assessed at a zero ratio, the remaining 75% is assessed at 100% of true cash value, for an average assessment ratio of 75%. Similarly, because 25% of the property effectively has a zero tax rate while 75% has an effective tax rate of 4%, the average tax rate would be reduced to 3%. A railroad challenging such a scheme would automatically prevail on a claim of rate discrimination as well as on a claim of assessment discrimination, even though the railroad's property is taxed identically to all other taxed property in the jurisdiction.

<sup>10</sup> *E.g.*, H.R. 12891 (1974).

property tax rates and assessments only to those for business property "subject to a property tax levy."

This latter refinement emerged without explicit comment in the congressional reports on the bill. The legislative records reveal, however, an active controversy over whether tax-exempt property would be removed from the comparison class. The requirement that comparison property be "subject to a property tax levy" first appeared in an early version of the legislation in 1961.<sup>11</sup> It applied, however, only to the provisions for discriminatory assessments, not discriminatory tax rates. States responded to that omission by lobbying Congress, over the course of several years, to preserve their ability to exempt property from taxation.<sup>12</sup> Shortly before the Act's passage, a Conference Committee reconciled competing House and Senate versions of the tax provisions.<sup>13</sup> The Conference compromise, ultimately enacted into law, included the critical language "subject to a property tax levy" in the definition of commercial and industrial property, thus applying it to both the rate and assessment sections.<sup>14</sup> As with many of the controversies that have arisen under the Act,

<sup>11</sup> See Doyle Report, *supra* at 465.

<sup>12</sup> E.g., Hearings on S. 2289, Subcomm. on Surface Transp. of Senate Comm. on Commerce, 91st Cong., 1st Sess. 83, 86 (1969)(report of the Western States Assoc. of Tax Administrators); Hearings on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, S. 2289, Subcomm. on Transp. and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 90, 94 (1970)(Statement of Charles Otterman, Chief Counsel, Cal. State Bd. of Equalization); *Id.* at 113 (resolution of the Multistate Tax Commission); Hearings on S. 927, Subcomm. on Surface Transp. of the Senate Comm. of Commerce, 90th Cong., 1st Sess. 116 (1967)(letter from F.H.W. Hofeke, Chairman, Oregon State Tax Comm.).

<sup>13</sup> Compare S. 2718 (1975)(applying "subject to a property tax levy" exclusion to both rate and assessment provisions) with H.R. 10979 (1975)(applying same exclusion only to rate provision).

<sup>14</sup> S. Rep. No. 959, 94th Cong., 2d Sess., 27-28 (1976).

there is no direct legislative history to explain Congress's choice of language or the reasons for it.<sup>15</sup> Committee testimony and official commentary is hardly necessary, however, because the change Congress made speaks unequivocally for itself.

The railroad industry in general, and carlines in this case, have been unable to find any persuasive counter to the statute's plain language. For the most part, they have been left to argue that construing the statute in this way is illogical because it would mean that state taxes would be tested when they are very low (*i.e.*, .0005 of value) but not when they fall all the way to zero (*i.e.*, tax exempt). They suggest that States, rather than reduce taxes on favored industries, will use exemptions to circumvent the statute and leave only the railroads subject to taxation.

Despite its possible surface appeal, that speculative concern never detained Congress. Nor has it caused a single lower court to construe subsections (b)(1)-(3) to include tax-exempt property in the comparison class. As a practical matter, States are far too reliant on property taxes from non-railroad sources to be able to leave only the railroads subject to ad valorem taxation.<sup>16</sup> Congress was undoubtedly aware of that reality when it determined that the important protection to extend to the railroads was parity with other taxed property; beyond that, it declined to intrude on

<sup>15</sup> Legislative history has proven largely unhelpful in many of the controversies that have arisen relating to § 306. See, e.g., *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. at 456 (legislative history "inconclusive and irrelevant"); *Chesapeake Western Railway v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991), *cert. denied* \_\_\_ U.S. \_\_\_, 112 S.Ct. 1577 (1992)(legislative history "admittedly rather thin"); *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983)(§ 306 was part of a much larger act and received "scant attention" in the legislative history).

<sup>16</sup> For example, in Oregon, property taxes from the railroad industry account for only a relatively small proportion of Oregon's \$2 billion plus property tax bill.



the policies reflected in State choices to exempt certain forms of property altogether.<sup>17</sup> The balance Congress struck may not be perfect from either the States' or the railroad industry's perspective. The correct question for lower courts, however, has been whether removing tax-exempt property was the choice Congress made. On that point, the courts have been unanimous. Beyond that, the response to the railroads' argument is the one the Eleventh Circuit gave:

Trailer Train has argued that it is inconsistent to hold that *partially* exempt property must be considered under § 306(1)(a) but that *totally* exempt property need not be. . . . [It is not] the prerogative of this court to amend the statute in order to correct some perceived inconsistency in application.

*Department of Revenue, State of Florida v. Trailer Train*, 830 F.2d at 1572 n.11(emphasis in original).

In short, whatever may be said of the breadth of subsection (b)(4)(prohibiting "any other tax" that discriminates) and the limitations of subsections (b)(1)-(3)(prohibiting discriminatory ad

<sup>17</sup> The choice Congress made in fact appears to be a product of compromise. States lobbied vigorously to be able to have partially exempt property insulated from challenge as well (see citations, *supra* at fn.12), a result which would have limited the protection to railroads drastically. Toward the end of the congressional deliberations, the Senate appeared to side with the States on this point and included in its version of the bill a provision that would have precluded a suit against any State with a provision in its constitution providing for a reasonable system of property classification (e.g., a system of partial exemptions). In contrast, the House version at this point not only lacked protection for partially exempt property, but it still permitted a claim of rate discrimination to be based on a comparison to fully exempt property. See H.R. 10979 (1975). The apparent compromise struck in the Conference Committee was to require that railroad taxes be equitable in relation to all taxed property, including property that is partially exempt, but to permit States to retain tax exemptions by not using them in the formula for comparison. See S. Rep. No. 959, 94th Cong., 2d Sess. 27-28 (1976). The fact that no constituency is appeased is often the surest sign of political compromise.

valorem taxes), one conclusion is beyond quarrel: Congress deliberately crafted the 4R Act so that a State's policy choice to exempt property from taxation altogether could not be used to invalidate either the tax rates or assessments applied to railroad property. Necessarily, Congress assumed that States would *both* tax property owned by railroads and exempt other property from any taxation. The Ninth Circuit's *per se* rule ("any exemption not also available to railroads violates the statute") could not be more at odds with Congress's design. Nor could it more thoroughly unravel the protection Congress deliberately gave to the States' taxation schemes.

## II

### The Issues Presented Are Important and Merit Review

#### A. Lower Courts Need this Court's Guidance.

In the 13 years since § 11503 went into effect, this Court only once has agreed to review the section's provisions and to resolve uncertainty about the meaning of its language. *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, *supra*, (whether Act confers jurisdiction to review alleged claim of discriminatory overvaluation). During that same period, lower courts have struggled to divine Congress's intent largely on a case-by-case, dispute-by-dispute basis. As the Fifth Circuit observed:

For better or worse, the tax provisions of the 4R Act give us few substantive and procedural standards. Therefore, in the manner of the common law, we must work out the meaning of 49 U.S.C. § 11503 gradually in relation to specific disputes.

*Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 379 (5th 1987).

The Ninth Circuit's decision in this case demonstrates several areas in which, over time, inconsistency, uncertainty and conflict have arisen among the lower courts. As the case law now stands,

whether railroads may prevail on a claim of "exemption discrimination" and, if so, what remedy they will win depends significantly on the jurisdiction in which the suit is brought.

### 1. Reconciling subsections (b)(1)-(3) with (b)(4).

At least in fundamental principle, the Ninth Circuit's decision conflicts with the several lower court opinions interpreting the ad valorem tax provisions of § 11503. As observed earlier, the courts unanimously have concluded that in enacting subsections (b)(1)-(3), Congress expressly declined to permit railroads to invalidate state tax rates and assessments by comparison to tax-exempt property. See pp. 10-11. Thus, lower courts have concluded that Congress was "well aware" of the limits it was placing on the comparison. *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d at 1571-72 and n.10. In that awareness was Congress's tacit approval and validation of State authority to grant tax exemptions:

The 4-R Act does not require a state to tax all business personal property; *the state is free to grant any exemptions*. What the Act does require, however, is that whatever property is taxed be taxed at a rate that does not discriminate against railroad property.

*Clinchfield Railroad v. Lynch*, 784 F.2d at 553 (emphasis added).

Congress could not have intended it both ways: on the one hand to leave States free to grant any exemptions, and on the other to invalidate their taxation of railroad property (as the Ninth Circuit has) the moment they did. The inherent inconsistency of those two results begs for resolution.

### 2. The scope of subsection (b)(4).

Even construing the scope of subsection (b)(4)'s prohibition of "any other tax" that discriminates has proven somewhat problematic. On the one hand, the Virginia Supreme Court has concluded that subsection (b)(4)'s reference to "any other tax"

does not include ad valorem taxes dealt with in the prior subsections, but rather refers to other or different schemes of taxation not contemplated in those provisions. *Richmond, Fredericksburg & Potomac R.R. Co. v. State Corp. Comm'n.*, 230 Va. 260, 336 S.E.2d 896, 897 (1985). By contrast, some earlier cases construed subsection (b)(4) to be limited to "in lieu" taxes — that is, taxes imposed in place of property taxes. See generally *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d at 372-74 (discussing cases).<sup>18</sup> Cf. *Chesapeake Western Railway v. Forst*, 938 F.2d 528 (4th Cir. 1991) *cert. denied* \_\_\_ U.S. \_\_\_, 112 S.Ct. 1577 (1992) (narrowly interpreting subsection (b)(1) using similar rationale).<sup>19</sup>

To be sure, however, the weight of authority construes subsection (b)(4) more broadly. Most circuit courts have concluded that the prohibition against "any other" discriminatory tax expresses Congress's general concern with tax discrimination of any kind. *Southern Railway Co. v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) *cert. denied* 465 U.S. 1100 (1984). See also *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d at 371-74 (canvassing cases). But as the Fifth Circuit

<sup>18</sup> In *McNamara*, Judge Gee acknowledged the "simple and compelling" argument that had been made in those cases. 817 F.2d at 372. However, he found it "too late in the judicial day" to agree with those decisions, for the "shadows have lengthened across their arguments, as one-by-one every Court of Appeals that has considered [whether subsection (b)(4) is limited to "in lieu" taxes] has sided with the railroads." 817 F.2d at 374.

<sup>19</sup> The Fourth Circuit declined to permit the railroads to challenge the appropriateness of the accounting methods by which a State determines the value of railroad property, a question this Court left open in *Burlington No. Ry. v. Okla. Tax Comm'n.*, *supra*. It held that the statute should be read narrowly, especially when to do otherwise would embroil the court in matters that bear on the policy-making powers of state government and that require the court to pass judgment on the "reasonableness" of a State's exercise of taxing authority. 938 F.2d at 531-33.



observed, "the meaning of 'discrimination' presents a somewhat trickier problem." 817 F.2d at 374. On that point, the circuits are far more fragmented.

### 3. When state taxes are "discriminatory."

In entertaining challenges to a State's system of tax exemptions, no court (other than the Ninth Circuit in this case) has held that the mere existence of a class of tax-exempt property, without more, violates the statute. Instead, the lower court decisions suggest at least three approaches.

First, courts have tested whether a State's exemptions are "neutral" — that is, whether they are directed to classes of property that railroads merely happen not to own — or whether railroads as a class of taxpayer have been singled out for adverse tax treatment. If railroads may bring themselves within the exemption on the same terms that all other taxpayers may, the exemption is not "discriminatory" within the meaning of the statute. The key is whether a State identifies taxed property by what is owned rather than by who owns it.<sup>20</sup>

The Eighth Circuit suggested that approach with its decision in *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981) *cert. denied* 454 U.S. 1086 (1981). In that case, certain "centrally assessed" property was taxed, but the identical property if "locally assessed" was tax-exempt. Because the "centrally assessed" property was, by definition, property owned

<sup>20</sup> Two hypotheticals demonstrate how the "neutrality" analysis would invalidate Oregon's tax on railroad property if the facts here were different. If Oregon exempted all property held by a commercial business for lease (which it does not) but taxed carlines' inventory of railroad cars held for lease, the disparate taxation would be discriminatory. Similarly, because Oregon exempts all business inventory, if it taxed the inventory of a company whose business was selling railroad cars to railroads (which it does not), the difference in treatment would again be deemed discriminatory.

by railroads and other utilities, the effect was to tax property owned by railroads *because* it was owned by railroads, and to leave the same type of property tax-free if owned by others. The same situation was presented in *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985). There, Iowa "rolled back" the assessed value of all locally assessed property, leaving it tax-exempt. Centrally assessed property, which again was defined by who owned it (railroads and a few other entities), was fully taxed. Again, the Eighth Circuit found such a scheme to be "discriminatory" because it denied to railroads as a class of taxpayer a benefit which other taxpayers as a class enjoyed. *But cf. Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988) *cert. denied* 490 U.S. 1066 (1989).<sup>21</sup> In contrast, where the exemption is directed to a class of property (*e.g.*, business inventory) that railroads happen not to own, but that would be exempt if they did, claims of discriminatory treatment have been rejected. *Trailer Train Co. v. State Board of Equalization*, *supra*.<sup>22</sup>

<sup>21</sup> The Eighth Circuit in *Leuenberger* rejected Nebraska's defense of its scheme, in which it asserted that its exemption of 75% of personal property was neutral and non-discriminatory. At first blush, the approach the Eighth Circuit took in that case appears inconsistent with the rationale of its decisions in *Ogilvie* and *Bair*. The explanation may lie in the final portion of the court's decision, where it concludes that the result of Nebraska's high percentage of exemptions "is that the exemptions apply to certain taxpayers" as in *Ogilvie* and *Bair*. 885 F.2d at 418. The court thus suggested that while the exemptions may have been neutral on their face, that neutrality disappeared at the point that nearly all property in the State was exempt from taxation except property the railroad owned.

<sup>22</sup> The district court concluded:

There is absolutely no indication that the creation of an exemption for business inventory discriminates against transportation property. The ratio of the assessed value of commercial and industrial property to its true market value is exactly the same as that for transportation property. The  
(continued...)



Other federal decisions suggest a second approach, one which would require examination of a State's entire taxing scheme to ensure that the tax burden is fairly distributed. The Eleventh Circuit, in a case challenging Alabama's gross receipts tax on railroads (which applied in place of property taxes), reversed the district court's holding that subsection (b)(4) did not permit it to entertain the suit. *Alabama Great Southern Railway Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981). The court of appeals directed the trial court on remand to consider "whether it would be appropriate for it to consider the entire tax structure as applied against railroads and as applied against 'all other commercial and industrial businesses by the State of Alabama.'" 663 F.2d at 1041. The Eleventh Circuit later adhered to that approach in a case involving the identical challenge carlines press here: that exempting "business inventory" from taxation while taxing property held by railroads is discriminatory. *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d at 1574 (remanding for trial). The court sent the case back for trial with the same instructions as in *Eagerton*.

In contrast, at least two courts have expressly declined to scrutinize a State's entire tax system. They have considered it "unrealistic to suppose that the overall burden of a state's tax system could be rationally evaluated by the methods of litigation." *Burlington Northern R. Co. v. City of Superior, Wis.*, 932

<sup>22</sup> (...continued)

state's treatment of business inventory does not reflect a differential treatment of taxpayers as to the assessment ratio or the applicable tax rate. At most, this case represents a case where an exemption is made available for a class of property which the plaintiffs do not own.

538 F.Supp. at 512. The district court below found Oregon's system neutral under this analysis. (App-32).

F.2d 1185, 1187 (7th Cir. 1991).<sup>23</sup> *Accord Kansas City Southern Ry. Co. v. McNamara, supra*. In place of that approach, they have adopted yet a third measure for what constitutes "discriminatory" taxation: as long as a State taxes railroads as part of a larger class of taxpayers, the tax will be sustained even if property owned by other groups is tax-free. As Judge Posner stated:

The state is confined to taxing railroads as members of larger taxpayer groups — owners of commercial and industrial property, recipients of gross income, recipients of net income, whatever. It cannot levy a tax on inputs into railroading alone.

*Burlington Northern R. Co. v. City of Superior, Wis.*, 932 F.2d at 1188. The rationale for this test is that the criteria for selection are not invidious if they do not target railroads as a politically powerless industry:

The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden.

*Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d at 375.<sup>24</sup>

<sup>23</sup> The Seventh Circuit's decision was not unanimous. Judge Flaum wrote a strong dissent in which he argued the need to make the more searching examination that the majority decision rejected. 932 F.2d at 1188-90.

<sup>24</sup> At least since *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938), this Court has recognized that the ability to form a political alliance with others similarly situated is the most powerful form of protection against discrimination. The rationale for a test that "ties the railroads' fate to the fate of a large and local group of taxpayers" fits precisely with Congress's reason for extending special tax protection to the railroads in the first instance. S. Rep. No. 1483, 90th Cong., 2d Sess. 2 (1968) (describing railroads as "easy prey for State and local tax assessors" because they are "nonvoting, often nonresident, targets for local taxation.")

The lower federal appellate courts have thus differed in their views of how to determine when "any other tax" is discriminatory within the meaning of subsection (b)(4). The Ninth Circuit followed none of the approaches used by the other circuits. Rather, it adopted a rule which rendered the invalidity of Oregon's system a foregone conclusion.<sup>25</sup> In any of these other circuits, Oregon's system of exemptions would have been sustained outright or it would at least have been subject to meaningful examination. Under the test in the Fifth and Seventh Circuits, Oregon would have prevailed: railroads receive the same tax treatment as a large and significant majority of Oregon commercial and industrial taxpayers. In the Eleventh Circuit, Oregon's entire tax structure would have been examined to determine whether the tax treatment of railroads is comparable to that accorded other commercial and industrial taxpayers. It is difficult to see how Oregon's system would have failed that test.<sup>26</sup> Even in the Eighth Circuit, on whose cases the Ninth Circuit purported to rely, Oregon's exemptions would have been tested for their neutrality, either facially (whether the exemption is based on what is owned rather than who owns it) or as applied (whether such a large percentage of non-railroad property is

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<sup>25</sup> The Sixth Circuit has implicitly rejected a *per se* test, thereby further isolating the Ninth Circuit. The court affirmed the denial of a preliminary injunction to a railroad complaining that Tennessee, like Oregon, exempts business inventory but taxes railroad property. *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, \_\_\_ F.2d \_\_\_ (May 15, 1992).

<sup>26</sup> For example, although the district court in this case rested its decision in large measure on the neutrality of Oregon's tax structure (App-33), the court also considered property not subject to the ad valorem taxes but taxed in other ways. Specifically, the court rejected carlines' contention that standing timber should be treated as "exempt." The court stressed that timber is subject to a severance tax when cut and declined to find that carlines were discriminated against as a result of this difference in treatment. *Ibid.*

exempt that the court can infer a discriminatory design). Oregon prevailed under that test when the district court applied it: it found Oregon's tax system neutral and non-discriminatory under both prongs. The Ninth Circuit, however, held Oregon to a novel *per se* rule — any exemption of property not owned by the railroads is discriminatory. That was a test neither Oregon nor any other state in the country could survive.

#### 4. *The appropriate remedy.*

The Ninth Circuit concluded that the State should be enjoined from collecting any property taxes from carlines, thus rendering them fully tax-exempt. At least one other court has done the same, and the Ninth Circuit expressly relies on that court's decision for the remedy it fashions here. (App-19)(citing *Trailer Train Co. v. Leuenberger*, *supra*). On its facts, however, the *Leuenberger* decision does not fit comfortably with this case. The Eighth Circuit's decision specifically relied on the high percentage (75%) of total commercial and industrial property that was exempt under the State's scheme, stating: "When three-fourths of the commercial and industrial personal property in the state is not taxed . . . railroads are discriminated against if their personal property is taxed. The appropriate remedy . . . is to enjoin the collection of the discriminating tax[.]" 885 F.2d at 418. Whether the Eighth Circuit would have reached that conclusion on the facts present in this case is highly doubtful.<sup>27</sup>

In contrast to that limited support for the Ninth Circuit's remedy, railroads generally are restricted under § 11503 to a remedy that gives them equal treatment, rather than favored

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<sup>27</sup> The district court found that between 31% and 38% of total commercial and industrial personal property available for taxation in Oregon is exempt. (App-31-32). The Ninth Circuit resolved all doubts in the State's favor and assumed a figure of 25% for purposes of its analysis. (App-18).



status. Under all of the other provisions of the Act, courts uniformly have concluded that railroads may only be relieved of taxes that exceed the *average* tax imposed in a jurisdiction. *See, e.g., Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 868 (9th Cir. 1983) *cert. denied* 464 U.S. 846 (1983) (under subsection(b)(3)); *State of Arizona v. Atchison, Topeka & S.F. R. Co.*, 656 F.2d 398 (9th Cir. 1981) (under subsection (b)(1)).<sup>28</sup> The Ninth Circuit's remedy, at least in this context, transforms a congressional policy designed to give railroads equal tax treatment into a policy that bestows on them the most favorable tax treatment accorded any category of property under a State's taxing policies.<sup>29</sup> Within the context of the Act as a whole, this remedy creates an anomaly that cannot easily be explained, and the Ninth Circuit's decision makes no effort to try.

<sup>28</sup> Relying on unequivocal legislative history, the Ninth Circuit concluded:

The pertinent comparison was meant to be between the property of the railroad and that of the "average" taxpayer "[t]o make the fairest comparison—that of the carrier with the hypothetical 'average' taxpayer—the committee intends that the unit to be used is that of all parcels of property in the district, considered in the aggregate." S. Rep. No. 91-630, 91st Cong., 1st Sess. 10 (1969). Other interpretations were explicitly rejected. The language was not meant to permit railroads to demand the same treatment as those holding property with the lowest assessment ratio[.]

*Id.* 656 F.2d at 404. *Accord General American Transportation Co. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986); *Louisville and Nashville R. Co. v. Dept. of Rev.*, 736 F.2d 1495 (11th Cir. 1984); *Clinchfield Railroad Co. v. Lynch*, 700 F.2d 126 (4th Cir. 1983) (citing legislative history).

<sup>29</sup> Perplexingly, the Ninth Circuit insisted that railroads be given tax-exempt status so that they would receive the same benefit that "preferred property owners" enjoy. (App-19). Oregon, however, determines tax rates and assessments only on the basis of property type, not on the basis of property owner. There is, accordingly, no class of "preferred property owners" as the Ninth Circuit suggests, other than the preferred class of railroads that the Ninth Circuit creates.

### 5. Nullification of subsections (b)(1)–(3).

As the Ninth Circuit interprets the Act, little remains of Congress's original design. The substantive rule the court announces, in combination with the remedy the court grants, all but nullifies the provisions relating to ad valorem property taxes. It is not merely rhetorical to ask why a railroad would ever again challenge a State property tax scheme under subsections (b)(1)–(3). Within the jurisdictional boundaries of the Ninth Circuit, there in fact is no reason why a railroad should. A railroad need never be content with merely demanding that a State's tax rates and assessments be equitable in relation to all other taxed property in the same jurisdiction. Instead, by pursuing a challenge under subsection (b)(4) — the generic "any other tax" provision — a railroad may point to the existence of *any* tax-exempt property in the State and thereby avoid all taxation of its own property. Where Congress endeavored to provide railroads with tax equality, the Ninth Circuit has handed them the windfall of tax freedom. Because every state exempts more than a *de minimis* level of property, the Ninth Circuit's decision renders the ad valorem provisions of § 11503 dead letters that no railroad rationally should invoke in the future.

### B. The Ninth Circuit's Decision Has Significant Implications for State Taxing Authority.

The tax structures of the several States vary greatly. For the most part, States are free to exercise their sovereign power to raise revenue in ways that best suit the diverse circumstances of their population, wealth, natural resources and local economies. Despite the differences in state taxation systems, two features are common to all: property taxation is a crucial source of revenue for every state government, and every State exempts classes of property from ad valorem taxes to advance key state economic and policy concerns. If, as the Ninth Circuit now holds, no State

may exempt even one class of property without also exempting all property owned by railroads, then Congress's reform was truly radical.<sup>30</sup>

If the Ninth Circuit has accurately construed Congress's intent, then Oregon (and presumably all other states, in time) properly will comply with it. Compliance will be at considerable cost, however. One option is for Oregon to restructure its entire property tax system to eliminate all tax exemptions. In reality, exercise of that option is unlikely, for it would stir insurmountable political and economic controversy and ultimately it would undermine important policies that Oregon cannot afford to sacrifice.<sup>31</sup> Oregon's other alternative is to give tax-exempt status to all property owned by railroads and affiliated industries. In terms of lost tax revenue from the railroad industry alone, this

<sup>30</sup> In asserting that the Ninth Circuit's decision precludes the exemption of even one class of property, we do not overstate the court's holding. To be sure, the court left open the possibility that a purely *de minimis* level of exempt property might not be deemed "discriminatory." The Ninth Circuit makes it plain, however, that non-taxed property would have to comprise a very small fraction of a State's total taxable property. (App-17). We are aware of no State that could survive the Ninth Circuit's *de minimis* test.

<sup>31</sup> The practical and political difficulty of completely eliminating exemptions from State *ad valorem* taxing schemes could not have escaped Congress's awareness. Throughout the 15 years the Act was under consideration, the States had lobbied Congress strenuously for the ability to retain their exemptions. See fn. 12, *supra*. Congress in fact rejected the Doyle Report's recommendation for a form of tax exemption for railroads (no tax on railroad rights-of-way) in favor of the tax equality suggested, ironically, by the Association of American Railroads. See, Doyle Report, *supra* at 463-66.

would total at least \$9 million a year.<sup>32</sup> Lost revenue in other States will magnify that impact many times over.<sup>33</sup>

That this case promises to generate litigation for lower courts, rather than settle it, is not a matter of idle speculation. Not surprisingly, the Ninth Circuit's decision has already prompted the filing and the recasting of lawsuits by other railroads and affiliated industries in Oregon seeking relief from taxation for all of their real and personal property.<sup>34</sup> Other railroads and affiliated industries predictably will now seek protection from property taxation in other Ninth Circuit States; some of those lawsuits, too, already have been launched.<sup>35</sup>

The implications of the Ninth Circuit's decision potentially reach beyond the taxation of railroad carriers, however. Both the

<sup>32</sup> The Oregon Department of Revenue estimates that in 1988, the year at issue in this case, approximately \$9 million in taxes was collected from railroads and affiliated industries based on the value of their "transportation property."

<sup>33</sup> Other States are expected to file an amicus brief in support of this petition for writ of certiorari to explain the potential impact of this decision on them.

<sup>34</sup> Carlines sought relief from personal property taxation only. The railroad industry, however, interprets the Ninth Circuit's decision to apply equally to real property. Two lawsuits have already been filed seeking full real and personal property tax exemptions for other railroads. *Burlington Northern Railroad v. Department of Revenue of the State of Oregon*, U.S.D.C. (D. Or., No. 92-585RE); *Portland Terminal Railroad v. Department of Revenue of the State of Oregon*, U.S.D.C. (D. Or., No. 92-607FR).

<sup>35</sup> When the Ninth Circuit announced its decision in this case, the State of Washington was soon to go to trial on a similar challenge to their tax exemptions brought in *Burlington Northern Railroad v. Department of Revenue of the State of Washington*, U.S.D.C. (W.D. Wash., No. C89-518(T)WD). The plaintiffs in that case immediately moved to expand their claim for relief to seek the remedy the Ninth Circuit granted here. The same railroad has now filed a similar claim for a subsequent tax year. *Burlington Northern Railroad v. Department of Revenue of the State of Washington*, U.S.D.C. (W.D. Wash., No. C92-5178(T)WD).



airline and motor carrier industries benefit from legislation modeled on the 4R Act which prohibits discriminatory taxation in similar but not identical terms. 49 U.S.C. § 11503a (motor carriers); 49 U.S.C. App. § 1513 (airlines). Case law and legislative history relating to § 11503 often guides courts in their consideration of discrimination challenges brought under those statutes. See, e.g., *ABF Freight System, Inc. v. Tax Division of the Arkansas Public Service Commission*, 787 F.2d 292, 293 n.1 (8th Cir. 1986). No doubt, in light of this decision, lawsuits brought by plaintiffs in those industries seeking tax-exempt status under the parallel federal legislation will follow. In fact, lawsuits advancing a similar theory had been filed in Oregon before the Ninth Circuit's decision even issued, and one has been filed in the State of Washington since.<sup>36</sup>

As significant is the possibility that States will be required, under other federal or state law principles, to relieve added classes of commercial and industrial taxpayers from taxation if the railroads are so relieved. Property taxes on other "centrally assessed" utilities in Nebraska have been invalidated on exactly that ground, in light of the Eighth Circuit's holding under the 4R Act that Nebraska must give the railroads tax-exempt status.<sup>37</sup> *Northern Natural Gas Co. and Enron Liquids Pipeline Co. v. State Board of Equalization and Assessment*, 443 N.W. 2d 249 (Neb. 1989) cert. denied 493 U.S. 1078 (1990)(analysis under federal equal protection principles and state constitution's tax

<sup>36</sup> E.g., *American Airlines v. Department of Revenue*, Oregon Tax Court No. 3140; *Continental Airlines v. Department of Revenue*, Oregon Tax Court No. 3135; *Alaska Airlines, Inc. et al. v. King County, et al.*, King County Super. Ct. No. 92-2-14872-2. These cases have been filed in state court because 49 U.S.C. App. § 1513 does not confer jurisdiction on the federal courts.

<sup>37</sup> *Trailer Train Co. v. Leuenberger*, supra.

uniformity clause). Oregon appears to be facing an identical claim, filed on behalf of a public telephone utility.<sup>38</sup>

Of course, lower courts properly can and should adjudicate those collateral issues first; none of them are presented to this Court yet. But, as the district court observed: "This case appears to be one small part of a national litigation plan. I have no doubt that Congress or the Supreme Court will soon have a turn at grappling with [§ 11503]." (App-28). The eruption of litigation that has followed in the brief period since this decision was announced demonstrates the long-range significance of the Ninth Circuit's holding. Its potential to force Oregon and other States to restructure their tax systems is real. In that process, states either will have to forego significant sources of revenue or burden more heavily the already strained resources of other taxpayer groups. This Court should review the Ninth Circuit decision before Oregon and other States are forced to travel the full length of the course the Ninth Circuit has set. By doing so, the Court can provide needed and timely guidance on the application of a statute that should reflect a uniform national policy, but that has sent lower courts in often inconsistent directions and has left States unsure of what federal law requires.

<sup>38</sup> Shortly after the Ninth Circuit announced its decision, the plaintiffs in *US West Communications, Inc. v. Department of Revenue* (Oregon Tax Court No. 3143) provided Oregon with a draft of an amended complaint incorporating a theory that appears to seek a tax exemption on the same theory that prevailed in the Nebraska case.



**CONCLUSION**

This Court should grant the petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,  
**CHARLES S. CROOKHAM**  
 Attorney General of Oregon  
**JACK L. LANDAU**  
 Deputy Attorney General  
**VIRGINIA L. LINDER**  
 Solicitor General  
**ROBERT M. ATKINSON**  
 Assistant Attorney General  
 Counsel for Petitioner

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
 FOR THE NINTH CIRCUIT**

ACF INDUSTRIES, INC.; GENERAL  
 AMERICAN TRANSPORTATION  
 CORPORATION; GENERAL  
 ELECTRIC RAILCAR SERVICES  
 CORPORATION, PULLMAN  
 LEASING COMPANY; RAILBOX  
 COMPANY; RAILGON COMPANY;  
 TRAILER TRAIN COMPANY;  
 UNION TANK CAR COMPANY,

*Plaintiffs-Appellants,*

v.

DEPARTMENT OF REVENUE  
 OF THE STATE OF OREGON,  
 RICHARD A. MUNN, IN HIS  
 CAPACITY AS DIRECTOR OF  
 THE DEPARTMENT OF REVENUE  
 OF THE STATE OF OREGON,

*Defendant-Appellee.*

No. 90-35402

D.C. No.  
 CV-88-1169-OMP

**OPINION**

Appeal from the United States District Court  
 for the District of Oregon  
 Owen M. Panner, Chief District Judge, Presiding

Argued and Submitted  
 January 8, 1991 — Portland, Oregon

Filed April 8, 1992

Before: James R. Browning, William C. Canby and Stephen  
 S. Trott, Circuit Judges.

Opinion by Judge Trott

[Names of counsel omitted in printing]

TROTT, Circuit Judge:

Appellants (collectively, the "Carlines") challenge the district court's judgment in favor of the Department of Revenue of the State of Oregon (the "DOR"). The Carlines sought declaratory and injunctive relief against the DOR's assessment and collection of the Carlines' personal property tax for 1988, alleging discriminatory taxation in violation of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (the "Act").<sup>1</sup> The

<sup>1</sup> In 1976, Congress passed section 306 of Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (1976), to solve the problem of discriminatory state taxation of railroads. *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 was originally codified at 49 U.S.C. § 26c, and its language was "slightly altered" when recodified in the Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, 92 Stat. 1337 (1978), 49 U.S.C. § 11503 (1988). *Id.* at 457 n.1. The recodified version "may not be construed as making a substantive change in the laws replaced." *Id.* (quoting section 3(a), 92 Stat. 1466); see also *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 258 (10th Cir. 1981) ("*Lennen I*"); *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495, 1497 (10th Cir. 1984) ("*Lennen II*"). "Because the revision was not intended to change the law, we must resolve any substantive conflicts between the original language of § 306 and the language in § 11503 in favor of the original language." *Lennen II*, 732 F.2d at 1497 (citing *Lennen I*, 640 F.2d at 258). There is, of course, an exception to this general rule for resolving conflicts between the original and the new language: If substantive language has disappeared altogether, there is nothing left to interpret. For example, section 306(1)(a) contained language that prohibited discriminatory assessments "(but only to the extent of any portion based on excessive values as hereinafter described) . . ." The language in parenthesis was deleted in the recodification. In *Arizona v. Atchison, Topeka & Santa Fe R. Co.*, 656 F.2d 398 (9th Cir. 1981), Arizona tried to take advantage of this language in a lawsuit filed after the language was deleted in the recodification, but this court denied the attempt, holding that "it is not necessary to interpret language in a statute that never went into effect, when there is no language in the statute that may lend itself to the interpretation put forward by Arizona." 656 F.2d at 410.

This case involves section 11503(b)(4), which provides in relevant part:

- (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

....

(continued...)

district court ruled the Carlines had not sustained their burden of showing impermissible discrimination, and denied relief. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

# I

## Federal Statutory Framework

Section 306(1) prohibits states from taxing transportation property in a discriminatory fashion. It provides in relevant part:

- (1) . . . [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

- (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value

<sup>1</sup>(...continued)

- (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under . . . this title.

The corresponding provision of section 306 provides that a State may not impose "any other tax which results in discriminatory treatment of a common carrier by railroad." Pub. L. No. 94-210, § 306(1)(d). To avoid any potential distortion of the meaning of the original enactment, we will therefore rely on the language of section 306(1)(d) in deciding this case.

of all such other commercial and industrial property.

- (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
- (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
- (d) The imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad subject to this party.

Pub. L. No. 94-210, § 306(1) (emphasis added).

The parties have stipulated that the Carlines' property is "transportation property" within the meaning of the Act. "Commercial and industrial property" is defined as:

all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy . . . .

Pub. L. No. 94-210, § 306(3)(c).

Section 306(2) provides that "the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section . . . ." Pub. L. No. 94-210, § 306(2).

## II

*Oregon's Ad Valorem Tax Scheme*

All real and personal property in Oregon except that expressly exempted is subject to ad valorem taxation, and must be assessed and taxed "in equal and ratable proportion." Or. Rev. Stat. §§ [sic] 307.030 (1989). All personal property must be valued at 100 percent of its fair market value. Or. Rev. Stat. § 308.250 (1989). Certain classes of business personalty are exempt from ad valorem taxation, including agricultural machinery and equipment, business inventories, livestock, poultry, bees, fur-bearing animals, and agricultural products in the possession of farmers. Or. Rev. Stat. §§ 307.400, 307.325 (1989). Motor vehicles are exempt from personal property taxation but are subject to fixed motor vehicle registration fees in lieu of property taxes. Or. Rev. Stat. § 803.585 (1989). Standing timber, which many regard as a cornerstone of the State's economy, is also expressly exempt from ad valorem taxation. Or. Rev. Stat. §§ 321.272, 321.420 (1989). Standing timber is considered real property, and is taxed under a separate scheme when it is harvested. Or. Rev. Stat. §§ 307.010(1), 321.005, *et seq.* (1989).

The State of Oregon taxes railroad cars as "tangible personal property." Or. Rev. Stat. § 307.030 (1989). The Carlines claim Oregon's taxation of railroad property is discriminatory, in violation of section 306(1)(d), because "a large majority of non-railroad business personal property is not taxed" while railroad property is taxed in full. The district court held that, although the Carlines had standing to bring an action under section 306 (1)(d), Oregon's exemption scheme constituted neither *de jure* nor *de facto* discrimination against the Carlines.

On appeal, the Carlines challenge the district court's ultimate conclusion, as well as the methodology it employed in examining



the discrimination issue. Although the DOR agrees with the district court's ultimate conclusion that there was no discrimination in violation of section 306(1)(d), it argues that the type of discrimination the Carlines allege should not have been analyzed under section 306(1)(d), but rather under 306(1)(a) or (c). We agree with the Carlines that the discrimination claim was properly analyzed under section 306(1)(d) and that the Carlines made the necessary showing of discrimination.

### III

#### *Standard of Review*

This matter was submitted to the district court on the pleadings, a stipulation of facts, and briefs. On appeal, we must determine whether the district court correctly applied the law to the stipulated facts. "Because the parties submitted this case on stipulated facts, the court's review is limited to a de novo examination of questions of law." *Elwood v. Aid Ins. Co.*, 880 F.2d 204, 206 (9th Cir. 1989). Further, "[s]ince the district court's application of the statutory scheme to the stipulated facts required consideration of the values underlying that scheme, the proper standard of review on appeal is de novo." *Sunshine Mining Co. v. United States*, 827 F.2d 1404, 1406 (9th Cir. 1987); see also *Schwartz Rojas v. Commissioner*, 901 F.2d 810, 812 (9th Cir. 1990) ("We review de novo the applicability of [the Internal Revenue Code] to the stipulated facts.").

"Though we would normally review the district court's findings of fact for clear error, the parties' stipulation to the facts obviates such review." *Planned Parenthood of S. Nevada v. Clark County School Dist.*, 887 F.2d 935, 939 (9th Cir. 1989) (citation omitted).

### IV

#### *The Discrimination Claim*

The Carlines argue that Oregon's exemption scheme violates section 306(1)(d). They claim "it is a violation of section 306(1)(d) to fully tax rail transportation personal property when substantial amounts of personal property of other commercial and industrial property of other commercial and industrial property owners [are] not taxed." The DOR's response is two-pronged. First, the DOR claims the Carlines may challenge Oregon's property tax scheme only under section 306(1)(a) or (c), which prohibit ad valorem taxation of railroad property at a higher "assessment ratio" or "rate" than non-railroad property,<sup>2</sup> but

<sup>2</sup> The DOR argued below that the Carlines do not have standing to sue under section 306(1)(d) because they are not common carriers by railroad. The DOR has apparently abandoned that argument on appeal, focusing instead on its argument that section 306(1)(d) does not apply to exemptions. Although we have not specifically decided whether entities other than railroads have standing to challenge a state tax under section 306, we have considered such challenges without discussing the standing question. See, e.g., *ACF Industries v. State of Arizona*, 714 F.2d 93 (9th Cir. 1983); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 864 (9th Cir.), cert. denied 464 U.S. 846 (1983). In this case, we agree with the district court that the Carlines have standing.

Section 306(1)(d) prohibits any tax that results in discriminatory treatment of a common carrier by railroad, even if the effect is indirect. Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also "results" in discrimination against the railroads. Reaching that very conclusion, the Eighth and Eleventh Circuits have emphasized "the close relationship between [the Carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d). In any event, the required analysis under 306(1)(d) could show an effect on private carlines which directly and integrally impacts on common carriers by railroad." *Department of Revenue, State of Florida v. Trailer Train*, 830 F.2d 1567 (11th Cir. 1987); see also *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir. 1991) (section 306 covers entities who are "engaged in the business of leasing railroad cars to railroads that use the leased cars in their interstate operations"); *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985) (same); *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 471-73 (8th Cir. 1983) ("[B]ecause tax discrimination

(continued...)

which do not prohibit discriminatory exemption schemes. See *ACF Indus. v. Arizona*, 714 F.2d 93 (9th Cir. 1983).

The DOR contends that the broader anti-discrimination provisions of subsection (1)(d) cannot be invoked in this case. It argues that subsections (1)(a) and (1)(c) fix the permissible scope of *property* taxation. Subsection (1)(d), on the other hand, prohibits "any other tax which results in discriminatory treatment" of the railroads, which to the DOR means that subsection (1)(d) applies only to taxes "*other*" than *property* taxes. According to the DOR, then, any challenge involving property taxes must be brought under subsection (1)(a) or (c). Because those subsections do not prohibit discriminatory exemption schemes, the DOR essentially argues that discriminatory exemptions in a state's property tax structure cannot be challenged under *any* subsection of section 306.

Second, the DOR contends that, even if the exemption scheme can be challenged under section 306(1)(d), section 306(1)(d) should be interpreted "in light of" sections 306(1)(a) and (c). Subsections (1)(a) and (c) compare transportation property to other "commercial and industrial property" to determine whether discrimination exists. "Commercial and industrial property" is defined as "all property, real or personal . . . which is subject to a tax levy." Pub. L. No. 94-210, § 306(3)(c). Exempt property, by definition, is not taxed, and would therefore not enter into the discrimination calculation

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<sup>2</sup>(...continued)

against the Carlines' railroad cars adversely affects common carriers by railroads directly and immediately as tax discrimination against the railroad cars of the carriers themselves, and because section 306(1)(d) prohibits any state tax which 'results in discriminatory treatment of a common carrier by railroad,' the plain language of the statute supports the district court's holding that [the Carlines have standing.]").

under subsections (1)(a) and (c). The DOR would like us to conclude by analogy that Oregon's exempt property should likewise not be included in the discrimination calculation under subsection (1)(d).

We disagree with both prongs of the DOR's argument, and agree with the Carlines.

#### A

##### *Applicability of Section 306(1)(d)*

We first address the DOR's contention that section 306(1)(d) does not apply to Oregon's exemption scheme because the validity of property tax exemptions is governed exclusively by section 306(1)(a) or (c), and is permitted under both subsections. Arguing that section 306(1)(d) does apply, the Carlines rely on three recent cases in which property tax exemptions were challenged under that section. See *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub nom.*, *Boehm v. Trailer Train Co.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2065 (1989); *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Although none of those cases dealt with the precise argument raised by the DOR, we are persuaded by them that subsection (1)(d) must be applied to cases of discriminatory property tax exemptions if Congress's purpose in enacting section 306 is to be served.

*Ogilvie* involved a challenge to North Dakota's assessment of railroad personal property at a higher ratio than non-railroad personal property. Under North Dakota's taxation scheme, "locally assessed" commercial and industrial property was assessed at 12.2% of market value, while "state assessed" property, including that of the railroads, was assessed at 16.8% of market value. *Ogilvie*, 657 F.2d at 208. As part of this



scheme, North Dakota included personal property and trade fixtures in the assessed value of railroad property, but exempted from taxation the personal property of locally assessed businesses. *Id.* at 209.

The Eighth Circuit held this exemption system violated section 306(1)(d), noting:

. . . The most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class. The inclusion of personal property in the assessed value of railroad property and other centrally assessed businesses imposes a personal property tax on centrally assessed businesses that is not imposed on locally assessed businesses.

*Id.* at 210 (quoting *Ogilvie v. State Bd. of Equalization*, 492 F. Supp. 446, 454-55 (D. N.D. 1980)). Because the statute on its face deliberately and openly discriminated against rail transportation property, it violated section 306(1)(d). *Id.*; see also *Leuenberger*, 885 F.2d at 417.

In *Bair*, Iowa "rolled back" the assessed value of all personal property, except that of railroads and a small number of other large taxpayers, with the result that ninety-five percent of personal property owners were exempt from taxation. *Bair*, 766 F.2d at 1224. Burlington Northern claimed the system was discriminatory, and resulted in 50% of Burlington Northern's property that *should* have been classified as personal being improperly classified as real property. Burlington Northern argued that it was entitled to the tax benefits of rollbacks and credits for this 50%. *Id.* The court agreed, holding:

. . . Iowa's classification scheme results in obvious discrimination against Burlington Northern by excluding it from the benefits of personal property tax rollbacks and credits which most other taxpayers enjoy. This type of *de*

*jure* discrimination clearly falls within the prohibition of section 306(1)(d).

*Id.*

Finally, in *Leuenberger*, Nebraska exempted certain personal property from taxation. The net result was that "75.75% of commercial and industrial personal property [was] exempt from taxation in Nebraska." *Leuenberger*, 885 F.2d at 416. Like the Oregon statute in question here, the Nebraska statute was "neutral on its face and non-discriminatory, in that it [did] not deny to any individual or entity the ability to benefit from the exemptions provided for specific items of personal property." *Id.* at 417. Even so, the court found the exemption scheme violated section 306(1)(d):

. . . Section 306(1)(d) prohibits the imposition of any other tax that *results in discrimination* . . . Tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d). It makes no difference whether the discriminatory result is achieved by exempting locally assessed property or exempting the property of particular business, the railroads are being discriminated against contrary to section 306(1)(d). The North Dakota and Iowa statutes gave tax benefits to certain taxpayers, those assessed locally. The Nebraska statute, instead, exempts certain kinds of personal property from taxation whether assessed locally or centrally. However, except for motor vehicles paying registration fees and business inventories, the exemptions apply only to agriculturally related personal property. Nebraska, through the use of exemptions has, in effect, given benefits to those taxpayers involved in agriculture which are denied to taxpayers involved in other businesses or industries. The exemptions are specific. Only taxpayers involved in agriculture are likely to own any of the exempted personal property. It is equally unlikely that

those involved in agriculture would own any operating railcars. Thus, the result is that the exemptions apply to certain taxpayers, the same as the North Dakota and Iowa statutes.

....

When the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against [the railroads] and violates § 306(1)(d)

....

*Id.* at 417–418 (emphasis in original); *see also Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 473 (8th Cir. 1983).

These cases demonstrate that sections 306(1)(a) and (c) do not define the limits of the Act's prohibitions against discriminatory taxation of railroads, even when that discrimination occurs in the context of an ad valorem property tax scheme. Subsections (1)(a) and (c) prohibit discrimination in assessment ratios and rates of taxation, but they do not provide that those prohibitions are the only ones applicable to property taxation, nor do they affect subsection (1)(d)'s ban on other types of discrimination. It is not surprising, then, that courts have applied subsection (d) to prevent other forms of discrimination in property taxes that are not reached by subsections (a) and (c).

As the Eighth Circuit stated in *Ogilvie*, the purpose of section 306 "was to prevent tax discrimination against railroads in any form whatsoever." *Ogilvie*, 657 F.2d at 210 (emphasis added); accord *Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("The legislative history and broad language of [§ 306] show Congress possessed a general concern with discrimination in all its guises . . .") (quoting *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. (1983)) (emphasis added in *Trailer Train*).

To effectuate that intent and prohibit the states from doing indirectly what sections 306(1)(a) and (c) prohibit them from doing directly, section 306(1)(d) must be read broadly. *See Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 (9th Cir.), *cert. denied* 464 U.S. 846 (1983) (different section of the Act interpreted broadly to accomplish congressional purpose of eliminating discriminatory taxation of property). We conclude, therefore, that section 306(1)(d) prohibits not only discriminatory taxes other than property taxes subject to subsections (a) and (c) but also — as here — taxation of a railroad's transportation property which discriminates in a manner other than by assessment ratio or rate.

## B

### *Interpretation of Section 306(1)(d)*

Having concluded that section 306(1)(d) applies to Oregon's exemption scheme, we now address the DOR's contention that totally exempt property should not be considered in the comparison because such property is not "subject to a property tax levy."<sup>3</sup>

The DOR relies on cases holding that sections 306(1)(a) and (c) are not violated when states exempt certain classes of property while taxing railroad property in full. *See ACF Industries v. State of Arizona*, 714 F.2d 93, 94 (9th Cir. 1983) ("*ACF Arizona*"); *Clinchfield R.R. Co. v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986) ("*Clinchfield*"); *Department of Revenue, State of Florida v. Trailer Train*, 830 F.2d 1567 (11th Cir. 1987) ("*Trailer Train Florida*"). The DOR would have us apply the holdings of these

<sup>3</sup> The phrase comes from the definition of "commercial and industrial property" in section 306(c)(3), 49 U.S.C. § 11503(a)(4).



cases to claims brought under section 306(1)(d). We decline the invitation.

In *ACF Arizona*, the Carlines argued that Arizona's property tax was discriminatory under section 306(1)(a). The parties agreed that section 306(1)(a) controlled the dispute, but they disagreed on the meaning of its language.

Section 306(1)(a) forbids states from assessing railroad property at an assessment ratio exceeding the average assessment ratio applicable to all "other commercial and industrial property in the assessment jurisdiction." Pub. L. No. 94-210, § 306(1)(a). The Carlines claimed "that the state ought to include in its calculation of commercial property all the business inventories in the state (which are categorically exempt from *ad valorem* taxes) in determining the assessment ratio." *ACF Arizona*, 714 F.2d at 94. Rejecting this notion for purposes of section 306(1)(a), we noted that "[t]his claim has nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored. We find no authority requiring untaxed property to be included in an average of assessed value for taxed property." *Id.*

In *Clinchfield II*, a group of railroads sought recovery for discriminatory taxation in violation of section 306(1)(a). On appeal, the state argued that "the court should not consider stored tobacco inventories because the tax rate applied to them is not the tax rate generally applicable to nonrailroad business property." *Clinchfield II*, 784 F.2d at 552. In essence, the state argued that, because tobacco inventories were taxed at a lower rate than other business property, they should be considered in the same way the *ACF Arizona* court considered the exempt business inventories — "not subject to a property tax levy." The Fourth Circuit rejected this argument, applying the *ACF Arizona* holding narrowly. It nevertheless endorsed the Ninth Circuit's reasoning:

The court in *ACF [Arizona]* was concerned only with totally exempt property, while the tobacco inventories in this case are taxed, but at a reduced rate. The . . . Act does not require a state to tax all business personal property; the state is free to grant any exemption. What the Act does require, however, is that whatever property is taxed should be taxed at a rate that does not discriminate against railroad property.

*Id.* at 553.

In *Trailer Train Florida*, the Eleventh Circuit, applying section 306(1)(a), concluded that exempt inventories should not be included in the definition of "other commercial and industrial property.["] The court noted:

A plain reading of the statute makes it apparent that business inventory which is totally exempt from taxation is not "subject to a property tax levy."

*Trailer Train Florida*, 830 F.2d at 1571. The court reinforced its conclusion with reference to the Act's legislative history:

The legislative history of the Act indicates that Congress was well aware of the property which was to be compared under the provisions of § 306(1)(a). In 1961, there was discussion that the comparison would be based on "all other property in the tax jurisdiction." S. Rep. No. 445, 87th Cong. 1st Sess. 465 (1961). Later the comparison was changed to "commercial and industrial property,["] with the latter category of property being confined to property "subject to a property tax levy."

*Id.* at 1572 n.10; see also *Trailer Train Co. v. State Bd. of Equalization*, 538 F. Supp. 509, 512 (N.D. Cal. 1982) ("*Trailer Train California*").

Although we have no quarrel with the reasoning of the above cases, they are simply inapposite. They apply only to sections 306(1)(a) and (c), which restrict the comparison class to "other



commercial and industrial property." There is no analogous restriction in the broad language of section 306(1)(d). Indeed, the court in *Trailer Train Florida* reached a different conclusion under section 306(1)(d) than under section 306(1)(a): "We agree with the district court's conclusion that § 306(1)(d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment." *Trailer Train Florida*, 830 F.2d at 1573. We conclude that the DOR's reliance on the above cases is misplaced. Our conclusion in Part IV(A) that section 306(1)(d) applies to exemption schemes would have no meaning if exempt property could not enter the equation.

## V

*The District Court's Methodology*

On appeal the parties agree that if "a majority" of nonrailroad property in Oregon is exempt from the ad valorem property tax imposed upon railroad property, discrimination is demonstrated under § 306(1)(d). See Appellant's Brief at 9; Appellee's Brief at 32-33. Although the district court declined to adopt any specific threshold, its opinion cited *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), as establishing a fifty percent rule. The district court concluded the Oregon tax did not constitute discrimination under 306(1)(d) because only 30% of non-railroad commercial and industrial property in the state was exempt.

We find no support for a fifty percent threshold in the language of the statute itself which flatly prohibits "any other tax which results in discriminatory treatment" of the railroads. The most natural reading of this language is that the statute is violated by *any* exemption given to other taxpayers but not to railroads. This is the reading adopted by the Eighth Circuit in *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981). In that case, North Dakota included personal property and trade fixtures

in the assessed value of railroad property while exempting the personal property of locally assessed businesses. The court found the imposition of a tax on railroad property that was not imposed on non-railroad property violated section 306(1)(d) without reference to the extent to which non-railroad property was exempt. See *id.* at 210.

Nor do the cases support a fifty percent threshold. *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), simply recites as a fact that fifty percent of Burlington Northern's property was in fact personal property and thus eligible for the favorable tax status accorded personal property owned by others. *Id.* at 1224-1225. Similarly, the court in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 418 (8th Cir. 1988), simply found the tax impermissibly discriminatory when 75% of commercial and industrial property but no railroad property was exempt; the court did not suggest a lower level of exemption of non-railroad property would have made the tax nondiscriminatory.

We agree with the Eighth Circuit that any exemption not also available to railroads violates the statute, with the possible qualification that a *de minimis* level of exemption available only to other taxpayers may not state a claim under section 306(1)(d). Such a qualification may be implied by analogy to section 306(2)(c) which prohibits the district court from granting relief under section (1)(a) unless the ratio of assessed value to true market value exceeds by 5% the ratio for all other commercial and industrial property — a provision the Supreme Court has read as embodying Congress's desire to avoid the litigation of *de minimis* disparate impact claims. See *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 464 (1987).

We do not decide in this case, however, whether such a *de minimis* limitation to the statute's apparently absolute prohibition of tax discrimination against railroads is to be implied. Under the

calculation most generous to DOR, the exemption given to non-railroad property not available to railroads is far from *de minimis*.

The parties disagree as to whether real as well as personal property should be included in calculating the extent of the exemption of non-railroad property; whether standing timber should be part of the comparison class, or should be completely ignored because it is subject to a severance tax at harvest and is simply not subject to ad valorem taxation; and whether non-railroad property that is persistently undervalued and under-reported should be treated as exempt.

Assuming all of these disputes are resolved in DOR's favor, 100% of Carlines' property is subject to Oregon's ad valorem tax, while 25% of non-railroad real and personal property is exempt from that tax.<sup>4</sup> The Carlines pay a substantial amount

TABLE	
Personal and Real Property (in billions of dollars)	
Assuming Standing Timber is "Exempt"	
Total Real and Personal Property	\$39.2
Taxed Property	
Personal Property	
Locally Appraised	\$ 3.6
Non-Railroad Utility	\$ 1.2
Real Property	
Non-Railroad Utility	\$ 4.8
Locally Assessed	\$ 8.3
	\$17.9
Exempt Property	
Business Inventories	\$ 6.8
Farm Machinery & Equipment	\$ 1.4
Motor Vehicles	\$ 1.5
	\$ 9.7
Percentage of Non-Railroad Property that is Exempt from Taxation	24.7%

<sup>4</sup>Because we assume, as the DOR argues, that undervaluation and underreporting are not discriminatory under section 306, those figures are excluded from the calculation.

annually in ad valorem tax they would not pay if their property was also exempt. We have no doubt this level of discrimination far exceeds any possible *de minimis* exception and thus violates the statute.

## VI

### Remedy

DOR argues the Carlines are only entitled to an exemption for the percentage of their property corresponding to the percentage of all non-railroad property that is exempt. In support of its argument, DOR relies solely on our decisions in *ACF Indus. v. State of Arizona*, 714 F.2d 93, 94-95 (9th Cir. 1983) and *State of Arizona v. Atchison, Topeka, and Santa Fe R.R.*, 656 F.2d 398, 404 (9th Cir. 1981). The decisions in these cases provide no support for DOR's argument. In both cases we were concerned only with what constituted the proper comparison to make out a substantive discrimination claim under section 306(1)(a). In *ACF Indus.*, the Carlines' challenge failed so the court never faced the issue of an appropriate remedy. Similarly, in *Atchison, Topeka and Santa Fe R.R.*, since Arizona sought only a declaratory judgment, the question of other remedies did not arise.

Carlines argues DOR should be enjoined from taxing any of its property under the present statute, relying on *Leuenberger*, 885 F.2d at 418, in which the court held that railroads subject to a discriminatory tax were entitled to the same total exemption preferred property owners enjoyed. We agree. The fact that there may be taxpayers other than railroads who are not exempt and must still pay the tax is irrelevant. These taxpayers are not protected by section 306(1)(d). We remand to the district court to enjoin DOR's collection of the ad valorem tax on the Carlines' property.

REVERSED AND REMANDED.

**APPENDIX B**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF OREGON**

ACF INDUSTRIES INCORPO- )  
RATION, GENERAL AMERI- )  
CAN TRANSPORTATION COR- ) CV No. 88-1169-PA  
PORATION, GENERAL ELEC- )  
TRIC RAILCAR SERVICES ) OPINION  
CORPORATION, PULLMAN )  
LEASING COMPANY, RAIL- )  
BOX COMPANY, RAILGON )  
COMPANY, TRAILER TRAIN )  
COMPANY, and UNION TANK )  
CAR COMPANY, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
DEPARTMENT OF REVENUE )  
OF THE STATE OF OREGON, )  
and RICHARD A. MUNN, in his )  
capacity as Director of the Depart- )  
ment of Revenue of the State of )  
Oregon, )  
 )  
Defendants. )  
[Names of counsel omitted in printing]  
PANNER, J.



Plaintiffs (Carlines)<sup>1</sup> bring this action against defendants Oregon Department of Revenue and its Director, Richard Munn (collectively "Department"). They seek declaratory and injunctive relief against the Department's assessment and collection of Carlines' Oregon personal property taxes for the tax year 1988.

The parties agreed that there are no material facts at issue and this case would be tried to the court based on fact stipulations, briefing on the legal issues, and argument. After argument, Department moved to supplement the record. I grant Department's motion to supplement the record (#46).

I find for Department. Below are my findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

#### BACKGROUND

##### I. Carlines

Carlines are a group of eight railcar companies. They purchase or lease railcars and furnish them to common carrier railroads for transporting freight. Carlines also furnish railcars directly to shippers. Carlines pay state taxes and pass the costs on to railroads through user charges.

Carlines have strong economic ties to railroad companies. For example, all the shareholders of plaintiff Trailer Train Inc. are railroads. Carlines have various mixes of customer types. For example, GATX Inc. leases 99% of its fleet to shippers and 1% to railroads. The percentages are the reverse for Union Tank Car Company Inc. Some plaintiffs are wholly-owned subsidiaries of others.

<sup>1</sup> The plaintiffs are: ACF Industries Inc., General American Transportation Corp., General Electric Railcar Services Corp., Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company and Union Tank Car Company.

##### II. The Oregon Property Taxation System

Under ORS 307.030, all tangible personal property in the State is subject to property tax unless it is expressly exempt. Taxes are assessed on 100% of true cash value. ORS 308.250. The average tax rate for 1988 is 2.489% of true cash value.

The following are examples of property expressly exempt from property taxation: agricultural machinery and equipment, business inventories, and agricultural products in the possession of farmers. ORS 307.040 *et seq.* Motor vehicles are exempt from personal property taxation but are subject to fixed motor vehicle registration fees in lieu of property taxes. ORS 803.585. Standing timber is real property under Oregon law. ORS 307.010(1). It is taxed at harvest. ORS 321.005 *et seq.*

As of January 1, 1988, the market values of taxed and untaxed personal commercial and industrial property, motor vehicles, and standing timber in Oregon were as follows:

	Value \$ (billions)	% of Total
1. Taxed tangible personal commercial and industrial property, excluding motor vehicles and standing timber	4.8	18.4
2. Motor Vehicles	1.5	5.8
3. Standing Timber	11.6	44.0
4. Exempt	<u>8.2</u>	<u>31.4</u>
5. Total	26.1	100.0

##### III. The Railroad Revitalization and Regulatory Reform Act

The parties stipulated that § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54, as codified, controls this action. Section 306 is codified at 49 U.S.C. § 11503.

Section 306(1) provides:

(1) Notwithstanding the provisions of 202(b), any action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other *commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property*.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on *transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction*.

(d) The imposition of *any other tax which results in discriminatory treatment of a common carrier by railroad* subject to this part.

(Emphasis supplied.) Under § 306(2), the district court has jurisdiction to enjoin substantive violations of § 306.

Paragraph (3)(c) of § 306 defines "commercial and industrial property" or "all other commercial and industrial property" as: all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is

devoted to a commercial or industrial use *and which is subject to a property tax levy* . . . .

(Emphasis supplied.) The parties agree that Carlines' property involved in this action is "transportation property" under § 306. The legislative history of the 4R Act, and its predecessors, spans about fifteen years. The goal of the 4R Act was to "eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property." S. Rep. No. 1483, 9th [sic] Cong., 2d Sess. 1 (1968), accompanying S. 927 and S. Rep. No. 91-630, 91st Cong., 1st Sess. 1 (1969).

The parties dispute whether legislative history should be used to interpret § 306, and if so, what that history shows about legislative intent. As often is the case, the legislative history shows a long, bitter battle among various interested groups. The only thing it clearly shows is the intent to compromise.

## DISCUSSION

### I. Standing

Carlines assert standing under § 306(1)(d). They rely on the § (1)(d) language prohibiting any other tax which "*results in discriminatory treatment of a common carrier by railroad*." ([E]mphasis supplied.) Carlines contend that this provision grants standing to parties challenging taxes that have a discriminatory effect on railroads, even if the effect is indirect.<sup>2</sup> Department disputes Carlines' standing. It argues that this action concerns a challenge to *property* taxes, the subject of § 306(1)(c), not

<sup>2</sup> Naturally, such challenges must meet the traditional "case or controversy" requirements of Article III of the United States Constitution, and show injury and causation. *Duke Power Co. v. Carline Environmental Study Group*, 438 U.S. 59, 72 (1978). However, there is no dispute about those requirements here.



§ 306(1)(d), which concerns *any other tax*. Therefore, Department reasons, the broad language of § (1)(d) does not apply in a challenge to property taxes.

The case law supports both positions. Although no case is binding or on all fours with this case, some of the reasoning is helpful.<sup>3</sup> For example, in *Trailer Train Co. v. State Board of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982) (*Trailer Train California*), the district court considered whether a business inventory property tax exemption that does not apply to railcar companies violates § 306(1)(a). That case presented the question whether § 306(1)(d) applies to railcar companies.

The *Trailer Train California* court held that railcar companies do not have standing under § (1)(d) because it read § (1)(d) as a prohibition against "discriminatory treatment" only of railroads. 538 F.Supp at 513. The court construed this as an "unequivocal limitation" of standing to common carriers by railroads. *Id.*

Other courts have held that § (1)(d) challenges are not limited to direct taxes on railroads. *See, e.g., Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Trailer Train v. Bair*, 765 F.2d 744 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985)(citing *Trailer Train v. State Board of Equalization*, 710 F.2d 468, 471-73 (8th Cir. 1983)); *c.f. General American Transportation Corp. v. Louisiana Tax Commissioner*, 680 F.2d 400 (5th Cir. 1982). These courts analyzed the question as one of legislative intent. They relied on the broad purpose of the 4R Act to eliminate the burden on interstate commerce resulting from discriminatory taxation of railroad transportation property.

<sup>3</sup> I am persuaded by Department's eleven-line footnote with citations to authority, that "[o]ut-of-circuit holdings are not binding upon courts within this circuit." Defendants' Response Brief at 40 n.2.

The Ninth Circuit has not directly addressed standing under § (1)(d). However, in *Trailer Train v. State Board of Equalization*, 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983), the circuit took a broad, legislative intent-based approach to a discriminatory railroad taxation question under §§ (1)(a)-(c). There, the court said that a statute should not be interpreted so narrowly as to defeat its obvious intent. 697 F.2d at 865. I agree.

I find reasoning of the Fifth, Eighth and Eleventh Circuits more persuasive than *Trailer Train California*. The law in those circuits is analytically consistent with the Ninth Circuit. The 4R Act prohibits not only discriminatory treatment of railroads, it also prohibits taxation that *results in* discriminatory treatment of railroads.

The *Trailer Train California* court notes that Congress could have removed the restrictive language "common carrier by railroad" if it intended to extend standing to railcar companies. 538 F.Supp at 513. Congress could just as easily have removed the words "results in" if it wanted to limit standing to railroads.

The obvious intent of § 306, taken as a whole, is to prohibit states and local governments from imposing discriminatory taxes on railroads. As the court discussed extensively in *Trailer Train Company v. State Board of Equalization of North Dakota*, 710 F.2d 468, 471-73 (8th Cir. 1983), the close relationship between the railcar companies and railroads results in discriminatory taxation against railroads when there is discriminatory taxation of railcar companies.

As Department argues, taking this approach to the extreme could produce absurd results. If any company that furnishes products to the railroad industry asserted standing under §(1)(d), there would be almost no limit to standing. Congress certainly could not have intended that. However, given the undisputed



close connections between Carlines and the railroad industry, I need not consider that problem. Carlines have standing.

## II. Challenge to the Oregon Property Tax System

The parties offer a vast array of options for deciding this case. They urge me to consider a variety of interpretations of § 306. This case appears to be one small part of a national litigation plan. I have no doubt that Congress or the Supreme Court will soon have a turn at grappling with § 306.

There are two possible types of discrimination under § 306, *de jure* and *de facto*, for lack of better terms. I address each in turn.

### A. There is no *de jure* discrimination.

In examining whether there is *de jure* discrimination, I rely on two elements of § 306. First, § 306(1)(a) prohibits assessment of transportation property at a value which is higher in relation to its true market value, than that ratio for all other commercial and industrial property. That language means that a state cannot, for example, assess Carlines' property at 100% of its true market value, while assessing all other commercial and industrial property at less than 100% of its true market value.

Second, § 306(1)(c) prohibits taxing transportation property at a tax rate higher than the rate applied to all other commercial and industrial property. This means that a state cannot, for example, tax Carlines' property at 10% of its assessed value while taxing all other commercial and industrial property at less than 10% of its assessed value.

Oregon does not commit either of these discriminatory acts. All personal property is assessed at 100% of its true market value and is taxed at the same rate. There is no *de jure* discrimination.

### B. There is no *de facto* discrimination.

The question of *de facto* discrimination is more difficult. Courts have danced around the possibility of *de facto* discrimination under § 306. Presumably, they recognize how easily a state could evade the clear intent of § 306 by having a facially non-discriminatory tax, but exempting all taxpayers except railroads.

The court raised the specter of *de facto* discrimination in dicta in *Clinchfield R. Co. v. Lynch*, 784 F.2d 545, 552 (4th Cir. 1986). There, North Carolina taxed stored tobacco at 60% of its fair market value, lower than the rate for other property. The court held that the trial court was correct in considering the differential tax rate as a factor in determining whether there was impermissible discrimination, saying:

Certainly, the 4R Act does not encroach upon the State's right to tax its citizens as it sees fit, as long as that tax does not discriminate against railroads. The problem . . . [with the North Carolina scheme] is not that it grants tax breaks for certain agricultural products. But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would be swallowed up in the exceptions.

784 F.2d at 552.

In *ACF Industries Inc. v. State of Ariz.*, 714 F.2d 93, 94 (9th Cir. 1983), the Ninth Circuit considered the possibility of *de facto* discrimination even more obliquely. The court rejected the argument that under § 306, the State of Arizona ought to include business inventories as commercial property. Arizona categorically exempted business inventories from ad valorem taxes. The court's rejection of this argument was cryptic. It said only that it has "nothing to commend it but a careful lawyer's desire to leave

no possible theory unexplored." The court found no authority requiring untaxed property to be included in an average of assessed value for taxed property.

*Trailer Train California* is perhaps the most direct stab at the issue of *de facto* discrimination under § 306, but is still not especially helpful. There, the court rejected the argument that exempting business inventories from taxation discriminates against railroads, for two reasons. First, the court read § 306 to require that the comparison class of property be property that is subject to a property tax levy, which by definition the exempt property is not. 538 F. Supp. at 512. This is tautological reasoning that could result in precisely the problem raised in *Clinchfield*.

More significantly, the court found no evidence that the business inventory exemptions were discriminatory against transportation property. The court found no evidence of differential treatment of taxpayers with respect to the assessment ratio or the tax rate. Rather, it was a case of an exemption for a class of property which the plaintiffs do not own. The court characterized the plaintiffs' argument as equivalent to a person with no taxable income arguing that deductions for charitable contributions favor the wealthy. 538 F.Supp at 512. n.5.

In so holding, the court considered the policy reasons behind the business inventory exemption. The exemption was designed to eliminate the incentive for businesses to hold their inventories outside of the state. The court declined to find "backdoor" discrimination, noting that the exemption was neutral in application, and not directed against any particular class of taxpayer. *Id.* at 512. The court was careful to distinguish *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), where personal property exemptions for certain types of property were

available for particular types of taxpayers, but not railroads. *Id.* at 512 n.5.

This case amounts to a request that I examine the personal property tax exemptions in the Oregon tax system to determine whether the exemption scheme is discriminatory.

Carlines' claim rests in large part on the argument that Department violates § 306(d) by exempting standing timber from property taxes.<sup>4</sup> This is conceptually the same type of argument that *Clinchfield* rejected, although in *Clinchfield*, the issue was tax rates, not exemptions. The value of standing timber demonstrates why it is so important to Carlines' argument to label standing timber "exempt".<sup>5</sup> If standing timber and motor vehicles are "exempt", the percentage of exempt property would be 81.6%. Excluding motor vehicles reduces that to 75.8%.

If standing timber and motor vehicles are "subject to property tax", the percentage of exempt property is 31.4%. Excluding motor vehicles increases that to 38.2%. Neither party has provided, and I have found no bright line between a discriminatory and non-discriminatory percentage of exemption. Based on cases that have addressed the issue of what percentage exemption is discriminatory, I would have to conclude that the with- and

---

<sup>4</sup> Carlines contend that some of the discriminatory effect of the property tax system comes through underreporting of taxable property. Department agrees that there is underreporting, but contends that the taxpayers are responsible for it and the State of Oregon does what it can to enforce reporting requirements. I agree that underreporting is not prohibited under § 306.

Carlines also contend that undervaluation of taxable property has a discriminatory effect. Undervaluation can be an element of underassessment under § (1)(a). *Burlington No. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). Department concedes undervaluation. However, Carlines have made no showing that undervaluation discriminates against them or that their property is not undervalued along with everyone else's.

<sup>5</sup> To a lesser degree, Carlines rely on the motor vehicle exemption.

without-standing timber figures straddle that line. For two reasons, I do not consider standing timber as exempt.

First, standing timber is taxed under an elaborate plan, which produces significant revenue for Oregon. Just because the tax is imposed at harvest, or that standing timber could be taxed in another way, does not mean that standing timber is not taxed. There is no evidence that Oregon timber owners benefit from the tax system at the expense of Carlines. Second, as in *Trailer Train California*, I find no reason to conclude there is "backdoor" discrimination in the exemption scheme. The scheme is neutral in application and there is no evidence that Oregon's tax system lacks an independently valid purpose.

If I assume that there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here, based on the above conclusions. In *Burlington Northern v. Bair*, 584 F.Supp 1229, 1237-38 (S.D. Iowa 1984), *aff'd in relevant part*, 766 F.2d 1222 (8th Cir. 1985) (other subsequent history omitted), the court found a 50% exemption impermissibly discriminatory. In *Trailer Train v. Leuenberger*, No. 87-L-29 (D. Neb. Filed Dec. 11, 1987), *aff'd* 885 F.2d 415 (8th Cir. 1988), the court found a 75% exemption impermissibly discriminatory.

I have found no cases, and Carlines have cited none, in which a court has found an exemption of approximately 30% impermissibly discriminatory. The burden is on Carlines to show impermissible discrimination. Carlines have not met that burden.

#### CONCLUSION

I grant Department's motion to supplement the record (#46). Carlines have standing to bring this action. Carlines have not met the burden of showing that the Oregon property taxation system

is impermissibly discriminatory under § 306 of the 4R Act. I grant judgment for Department.

DATED this 22 day of January, 1990.

[Signature omitted in printing]



**APPENDIX C**

49 U.S.C. § 11503

(a) In this section—

- (1) “assessment” means valuation for a property tax levied by a taxing district.
- (2) “assessment jurisdiction” means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.
- (3) “rail transportation property” means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].
- (4) “commercial and industrial property” means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

- (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
- (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) An assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assess-

ment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

**APPENDIX D**

**Section 306 of the Railroad Revitalization  
and Regulatory Act of 1976**

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the Constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the



parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain or terminate any acts in violation of this section, except that—

(1) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such

taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose distinct within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owed by the National Railroad Passenger Corporation.

(2)  
No. 92-74

Supreme Court, U.S.

FILED

AUG 6 1992

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
and RICHARD A. MUNN, in his capacity as Director of  
the Department of Revenue of the State of Oregon,  
*Petitioner,*

v.

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN  
TRANSPORTATION CORPORATION, GENERAL ELECTRIC  
RAILCAR SERVICES CORPORATION, PULLMAN LEASING  
COMPANY, RAILBOX COMPANY, RAILGON COMPANY,  
TRAILER TRAIN COMPANY, and  
UNION TANK CAR COMPANY,  
*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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### QUESTION PRESENTED

Respondents re-state the Question Presented as follows:

Was the Court of Appeals wrong in holding, as have all other Courts of Appeal to have considered the question, that the imposition of a property tax on railroad personal property violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 when significant amounts of other commercial and industrial tangible personal property are not taxed due to statutory exemptions?



**LIST OF PARTIES TO THIS PROCEEDING AND RULE  
29.1 STATEMENT**

The petitioner is the Department of Revenue of the State of Oregon (hereinafter referred to as the "Department").

Respondent ACF Industries, Incorporated is a wholly-owned (99%) subsidiary of Icahn Holding Corporation, which is owned by Carl C. Icahn.

Respondent General American Transportation Corporation is a wholly-owned subsidiary of GATX Corporation. Except for wholly-owned subsidiaries, General American Transportation Corporation does not hold a direct majority interest in any other corporation.

Respondent General Electric Railcar Services Corporation (now General Electric Railcar Leasing Services Corporation) is a wholly-owned subsidiary of General Electric Capital Corporation, which is a wholly-owned subsidiary of General Electric Financial Services, Inc., which is a wholly-owned subsidiary of the General Electric Company.

Itel Rail Corporation, successor-by-name-change to plaintiff Pullman Leasing Company, is a wholly-owned subsidiary of Itel Corporation.

Respondent Union Tank Car Company is a wholly-owned subsidiary of Marmon Industrial Corporation, which is a wholly-owned subsidiary of GL Sub Co., which is a wholly-owned subsidiary of Marmon Holdings, Inc.

Respondents Railbox and Railgon are wholly-owned subsidiaries of plaintiff Trailer Train Company (now TTX Company). TTX Company's shareholders are:

Atchison, Topeka & Santa Fe Ry. Co.  
Boston & Maine Corporation  
Burlington Northern Railroad Co.  
Chicago & North Western Trans. Co.  
Consolidated Rail Corporation  
CSX Corporation  
Florida East Coast Ry. Co.  
Grand Trunk Western R.R. Co.  
Illinois Central Gulf R.R. Co.  
Kansas City Southern Ry. Co.  
Norfolk Southern Corporation  
Richmond, Fredericksburg  
& Potomac R.R. Co.  
Rio Grande Industries, Inc.  
Soo Line R.R. Co.  
Union Pacific Corporation

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1992

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**No. 92-74**

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
 and RICHARD A. MUNN, in his capacity as Director of  
 the Department of Revenue of the State of Oregon,  
*Petitioner,*

v.

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN  
 TRANSPORTATION CORPORATION, GENERAL ELECTRIC  
 RAILCAR SERVICES CORPORATION, PULLMAN LEASING  
 COMPANY, RAILBOX COMPANY, RAILGON COMPANY,  
 TRAILER TRAIN COMPANY, and  
 UNION TANK CAR COMPANY,  
*Respondents.*

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**On Petition For A Writ Of Certiorari  
 To The United States Court Of Appeals  
 For The Ninth Circuit**

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**RESPONDENTS' BRIEF IN OPPOSITION**

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**OPINIONS BELOW**

The opinions below are adequately identified in the  
 Petition.



## JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

### STATUTORY PROVISION INVOLVED

The statute involved is Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("Section 306"). Section 306 was originally codified at 49 U.S.C. §26c, and its language was slightly altered when recodified at 49 U.S.C. §11503. The codification is not to be construed as making any substantive changes. See §3(a), 92 Stat. 1466. The Department sets forth the text as recodified in the body of its Petition but attaches both the original and the recodified texts as Appendices. Respondents, like the Ninth Circuit, will rely exclusively on the original language of Section 306 to avoid any potential distortion of the meaning of the original enactment. See App-2, note 1.<sup>1</sup>

### STATEMENT OF THE CASE

Respondents (hereinafter referred to as "Carlines") amend and expand upon the Department's Statement of the Case as follows.

1. The Petition's summary of the legislative purpose of Section 306, contained in Section 1 of its Statement of the Case, is incomplete. The effort to minimize the importance of Section 306 as but "one small part" of the 4-R Act is contradicted by the unequivocal language of Section 306 and the broad construction of Section 306 afforded by the courts.

<sup>1</sup> A copy of Section 306 appears as Appendix D to the Petition.

Section 306 was enacted as part of a comprehensive congressional plan to revitalize the nation's railroads and to strengthen its transportation system. After more than 15 years of investigation, various congressional committees and study groups concluded that state tax discrimination against railroads was pervasive and constituted an undue burden upon interstate commerce; that state laws which guaranteed equal tax treatment for railroads had not been observed; and that state administrative and judicial remedies had not afforded railroads an adequate means of obtaining relief from discriminatory state taxation. The committees recommended that Congress establish a clear federal policy against discriminatory state taxation of railroads and create an efficient federal judicial remedy to enforce such a policy against the states. See *Atchison, Topeka & Santa Fe Ry. Co. v. Board of Equalization*, 795 F.2d 1442, 1443, n.2 (9th Cir. 1986), *vacated on other grounds*, 828 F.2d 9 (9th Cir. 1987), and authorities cited therein. See also *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 456 (1987).

Declaring state tax discrimination against transportation property to be "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce", Section 306 confers jurisdiction upon district courts of the United States, notwithstanding 28 U.S.C. §1341 and without regard to amount in controversy or citizenship of the parties, to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain or terminate any acts in violation of [Section 306]." See Section 306(2).

2. The case was submitted to the courts below on a comprehensive Stipulation of Facts which shows that the Carlines' railroad personal property is fully taxed, but significant amounts of commercial and industrial tangible personal property in Oregon are not. The parties stipulated to facts showing that approximately 75% of the value of commercial and industrial personal property in Oregon is not taxed for various reasons, but primarily because of the statutory exemption of major classes of commercial and industrial personal property, such as business inventories, farm machinery and equipment, and motor vehicles. A stipulated \$9.7 billion in value of commercial and industrial personal property is exempt from taxation, while only \$4.8 billion of such property remains subject to tax.<sup>2</sup> Although the underlying facts were stipulated below, the parties disagreed as to how the level of discrimination should be calculated. Assuming the resolution of all these calculation disputes in favor of the Department, the Ninth Circuit observed that 25% of all commercial and industrial property, both real and personal, is exempt.

3. The Carlines sought relief under Section 306(1)(d), which prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad." The Carlines claimed, and the Ninth Circuit agreed, that the imposition of property taxes on their rail cars<sup>3</sup> results in discrim-

<sup>2</sup> See Ninth Circuit's Table at App-18.

<sup>3</sup> Although the Carlines furnish and lease rail cars to the railroads, the Carlines are not themselves "railroads." Section 306(1)(d) prohibits taxes which result in discrimination against "railroads." The great weight of authority holds that Section

inatory treatment in violation of Section 306(1)(d) in light of Oregon's statutory exemption scheme.

In summarizing the Ninth Circuit's opinion, the Department isolates a narrow portion of the holding but overlooks the fact that the opinion expressly follows the unanimous federal appellate authority governing analysis of discrimination under Section 306(1)(d). The Ninth Circuit's opinion joins the other circuits in finding discrimination by exemption subject to Section 306(1)(d) and in enjoining the continued taxation of Carline property in a case where substantial commercial and industrial property likewise enjoys complete exemption.

#### REASONS FOR DENYING THE WRIT

Certiorari should be denied because Petitioner fails to show why the case warrants review.

Certainly the argument that the Ninth Circuit has incorrectly applied Section 306(1)(d), even if it were true, presents no basis for certiorari. Neither conflict in the circuits nor other special or important reason exists for granting the writ.

The Ninth Circuit has not departed from the case law of the other circuits. Its opinion explicitly follows and builds upon the prior holdings of the most apposite cases under Section 306. At best, Petitioner simply foresees a "developing" conflict primarily by comparing the case below to cases under totally dif-

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306(1)(d) prohibits the discriminatory taxation of Carlines because of the close relationship between the Carlines and the railroads. The Ninth Circuit adopts that view. See App-7, footnote 2. The Department now concedes the point. See Pet., p. 5, footnote 5.



ferent facts, and predicting its application to future fact patterns. This is not a true conflict.

Moreover, the decision below is correct. Section 306 is broad, remedial legislation, enacted by Congress to effectuate national transportation policy pursuant to its plenary constitutional authority over interstate commerce.<sup>4</sup> The courts, including this Court, have uniformly construed Section 306 in light of its unequivocal language and remedial purposes to prohibit tax discrimination against railroads and rail property in all of its guises. In over a decade of litigation under Section 306 the circuits have disagreed on the meaning of Section 306 but once. That conflict was promptly resolved by this Court in favor of a plain reading of Section 306.<sup>5</sup> Since that time, the courts have considered a myriad of factual patterns on a case-by-case basis but have been remarkably consistent in announcing governing principles. A well developed and consistent body of precedent exists upon which particular cases such as this may be decided.<sup>6</sup>

<sup>4</sup> This case does not involve the balance between state taxing authority and federal constitutional limitations on the states. Congress has itself struck the balance here. The sole issues presented here concern how an absolute congressional prohibition on tax discrimination is to be applied in the particular factual situation presented.

<sup>5</sup> *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454 (1987).

<sup>6</sup> *Burlington Northern Railroad Company v. City of Superior, Wisconsin*, 932 F.2d 1185 (7th Cir. 1991); *Trailer Train Company v. State Tax Commission*, 929 F.2d 1300 (8th Cir.), cert. denied, 116 L.Ed.2d 133 (1991); *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied sub nom. *Boehm v. Trailer Train Company*, 490 U.S. 1066 (1989); *De-*

The Ninth Circuit added to that body of precedent, without departing in any significant way from it, by its holding that Section 306(1)(d) simply means what it says, and is violated under the circumstances stipulated to exist here of discrimination by extensive exemption.

#### 1. There Is No Conflict in the Circuits.

The Petition attacks legal principles which are quite well settled. As the Petition admits, every federal appellate court to have considered the issue has concluded, contrary to the Department's position, that Section 306(1)(d) applies to cases of discrimination arising from tax exemption of other commercial and industrial property. See, e.g., *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied sub nom. *Boehm v. Trailer Train Company*, 490 U.S. 1066 (1989); *Department of Revenue, State of Florida v. Trailer Train Company*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern Railroad Com-*

*partment of Revenue, State of Florida v. Trailer Train Company*, 830 F.2d 1567 (11th Cir. 1987); *Kansas City Southern Railway Company v. McNamara*, 817 F.2d 368 (5th Cir. 1987); *General American Transportation Corporation v. Commonwealth of Kentucky*, 791 F.2d 38 (6th Cir. 1986); *Trailer Train Company v. Bair*, 765 F.2d 744 (8th Cir.), cert. denied, 474 U.S. 1021 (1985); *Burlington Northern Railroad Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984), aff'd in part, 766 F.2d 1222 (8th Cir. 1985) (other subsequent history omitted); *Southern Railway Company v. State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Trailer Train Company v. State Board of Equalization*, 697 F.2d 860 (9th Cir.), cert. denied, 464 U.S. 846 (1983); *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981); *Ogilvie v. State Board of Equalization*, 492 F.Supp. 446 (D. N.D. 1980), aff'd, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981).



*pany v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Ninth Circuit expressly follows these cases in its decision, and simply applied the existing precedent to the case before it.

Beginning with the Eighth Circuit's decision in *Ogilvie*, every federal appellate court has rejected the statutory construction arguments, raised and rejected once again below, that Section 306(1)(d) is inapplicable to property exemption cases because that subsection is limited to non-property taxes, and because exemptions are immune from scrutiny under Section 306(1)(d). The cases concerning property tax exemption which have reached the federal appellate courts, including this case, have each involved an analysis of the particular circumstances presented, but there has been no conflict on the legal principles which govern that analysis. Accordingly, this case presents no occasion for this Court's review.

## 2. No Special or Important Reasons Exist for Granting the Writ.

Lacking a conflict in the circuits, the Department makes three interdependent arguments in support of its Petition.

First, it argues that the case below was wrongly decided even though it follows and applies unanimous and closely applicable circuit precedent. Then, based primarily upon the doubtful premise of such error, the Department argues that the lower courts are confused and in need of guidance. Finally, the Department portrays predicted adverse consequence of the supposed erroneous interpretation of Section 306 below.

These arguments primarily state and restate the Department's conviction that the case below should have been decided differently. None shows a special or important reason for granting a writ of certiorari here.

Carlines will address each of these arguments in turn.

## a. The Decision Below is Consistent with Section 306.

The Petition argues that the Ninth Circuit's ruling is wrong because it is contrary to both the statutory wording of Section 306 as a whole, and legislative history which supposedly shows that Congress specifically intended that Section 306 be construed to permit any exemptions which the states might choose to enact.

The Department's position in this regard is plainly untenable as shown by the well-reasoned and unanimous circuit court precedent against it. *See Trailer Train Company v. Leuenberger, supra*; *Department of Revenue, State of Florida v. Trailer Train Company, supra*; *Burlington Northern Railroad Company v. Bair, supra*; *Ogilvie v. State Board of Equalization, supra*.

As the courts have concluded, the language and structure of Section 306 simply do not admit of such a construction of Section 306(1)(d). As *Ogilvie* was the first to rule, the exclusion of exemptions from the analysis in a case under Section 306(1)(a) does not mandate a similar construction of Section 306(1)(d). In fact, the limited scope of Section 306(1)(a) is a strong reason why Section 306(1)(d) must be construed to apply to exemption cases if the Congress-

sional purpose to prohibit discrimination is not to be frustrated.

Section 306(1)(d) prohibits any tax which "results" in discrimination. The circuit courts have applied that provision to mean exactly what it says.

The Department's legislative history argument, which it presented in detail to the Ninth Circuit, is similarly flawed. Because there is no definitive legislative history on point, the Department resorts to isolated references in the legislative history and a loose chain of logic in an effort to narrow and restrict the scope of relief available under the plain language of Section 306. As the Petition itself candidly admits, similar attempts to narrow Section 306 in other cases have been rebuffed by the courts, mainly on the ground that the commands of Section 306 are so clear that resort to legislative history to resolve alleged ambiguities is improper and unnecessary. For example, in *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, *supra*, this Court was invited by the State of Oklahoma to analyze certain statements in the legislative history of Section 306 to support the state's argument that federal courts were not allowed, under Section 306(1)(a), to inquire into the state's determinations of the value of railroad property. This Court rejected not only Oklahoma's conclusion but also its method of analysis. This Court stated:

Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of a statute itself 'must ordi-

narily be regarded as conclusive.'" (citation omitted). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete."

481 U.S. at 461.

Section 306(1)(d) is similarly clear and unambiguous, as has been recognized by every court to interpret its meaning. Therefore, resort to portions of the legislative history to discover an alleged immunity for tax exemptions is unnecessary and inappropriate.

#### **b. The Lower Courts Do Not Require Guidance.**

The Petition argues that the Ninth Circuit decision has somehow "aggravated" a supposed "developing conflict among lower courts" in Section 306 cases. *See* Pet., p. 8. Indeed, the Department struggles mightily to suggest that confusion reigns among lower courts concerning the meaning of Section 306.

There is, however, no "developing" conflict. The "inconsistency, uncertainty, and conflict" which the Department perceives exist only in the distorted light of its own narrow and erroneous reading of Section 306.

The lower courts have in fact been quite consistent. Following this Court's holding in *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, they have read and applied Section 306 by its plain and remedial meaning. They have refused to allow differing statutory schemes employed by the states to obfuscate Section 306(1)(d)'s clear prohibition against any tax which "results in discriminatory treatment." For example, it does not matter that a state may



choose to exempt based on the description of the property owned, rather than the identity of the taxpayer. In either case, continued taxation of railroad personal property must fail where significant amounts of other commercial and industrial personal property, regardless of the device used, escape taxation. The courts have refused to allow precisely what the Department now argues before this Court, which is that it somehow makes a difference in judging the "resulting" discrimination if a state uses different statutory schemes to achieve the same result—the exemption of significant amounts of commercial and industrial personal property, while continuing to tax railroad personal property in full.

The Department cites allegedly differing analyses among the circuits primarily by comparing the exemption cases to other kinds of Section 306 cases which present issues not raised by these facts and not before this Court.<sup>7</sup> The language and analyses of those cases were different than the Ninth Circuit's because the issues and taxes considered in those cases were completely different. However, any differences do not create conflict or confusion. Actually, all of those cases are consistent in finding that Section 306(1)(d) prohibits all discriminatory taxes.

The Petition even resorts to a ten-year old decision of a district court in the Ninth Circuit. *Trailer Train Company v. State Board of Equalization*, 538 F.Supp.

<sup>7</sup> Although many of the cases cited in fact demonstrate how broadly Section 306(1)(d) has been interpreted to prevent discriminatory taxes, they did not involve property tax exemptions. See, e.g., *Kansas City Southern v. McNamara*, *supra*; *Alabama Great Southern Railway Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); *Burlington Northern v. City of Superior*, *supra*.

509 (N.D. Cal. 1982). The reasoning of this decision has been unanimously and explicitly rejected by the appellate courts<sup>8</sup>, and even by the district court in the instant case, which described that case's reasoning as "tautological." See App-30.

The Department similarly cites the state court's decision in *Richmond, Fredericksburg and Potomac Railroad Co. v. State Corporation Commission*, 230 Va. 260, 336 S.E.2d 896 (1985), a *per curiam* decision which held, without analysis or reference to case law, that Section 306(1)(d) does not apply to ad valorem property taxes. As the Petition admits, this decision has not been followed by any other case and is clearly an anomaly in the development of the case law. To suggest that this decision is causing conflict among the lower courts is ludicrous.

In a footnote, the Department suggests that the recent decision of the Sixth Circuit in *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, 964 F.2d 548 (6th Cir. 1992), is at odds with the Ninth Circuit. That case, however, dealt solely with the appropriate standards and quantum of proof to decide when preliminary injunctions should issue under Section 306. Unlike this case, which was tried on *stipulated* facts, the qualitative and quantitative impact of exemptions in Tennessee was contested. The Sixth Circuit did not address the principles enunciated in *Ogilvie* and its progeny, but simply found no abuse of discretion in the district court's ruling that the plaintiff had not *factually* shown reasonable

<sup>8</sup> See, e.g., *Department of Revenue v. Trailer Train*, *supra*, 830 F.2d at 1573; *Trailer Train Company v. State Board of Equalization*, 710 F.2d 468, 471 (8th Cir. 1983).



cause to believe that a violation of the Act had occurred.

The Department's reliance on *Clinchfield Railroad Company v. Lynch*, 784 F.2d 545 (4th Cir. 1986), is puzzling and totally misplaced. The Department claims *Clinchfield* supports its assertion that Congress left the States free to grant exemptions without any resultant scrutiny under Section 306. The Fourth Circuit did make the statement quoted in the Petition that states are free to grant exemptions, but went on to observe, consistent with *Ogilvie*:

But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of §306 would soon be swallowed up in the exceptions.

See 784 F.2d at 552.

The Department also asserts that the lower courts somehow are plagued with uncertainty concerning the manner in which the discriminatory effect of exemptions should be determined, and the proper remedy for the discrimination. The Department is wrong on both counts, and simply desires to argue that the findings of the courts on the existence and extent of discrimination are wrong. The Department's characterization that the Ninth Circuit has established a "per se" rule which conflicts with the other circuits is totally unfounded. Nowhere in the Ninth Circuit's opinion does the phrase "per se" appear.

The Department's statement that the Eighth Circuit's decision in *Leuenberger* "does not fit comfort-

ably" with the facts of this case is completely wrong, and is apparently based on the mischaracterization that only 31%-38% of the total commercial and industrial personal property in Oregon is exempt. See Pet., p. 23, footnote 27. This percentage includes *timber*, which both parties concede is *real* property under Oregon law. In fact, the stipulated facts support the finding that 67% of commercial and industrial personal property in Oregon is exempt.<sup>9</sup> Therefore, these facts square easily with *Leuenberger*, in which 75% of the personal property was stipulated to be exempt. Indeed, it is nearly impossible to distinguish the facts stipulated here from those in *Leuenberger*.

The remedies employed by the circuits to date have been consistently applied. Where, as here, most or all personal property is exempt, then the Carlines should not pay tax on their personal property. Where equity can be achieved by less than an injunction of all taxes, a proper remedy can be and has been crafted. See, e.g., *Burlington Northern v. Bair*, *supra* (applying equal valuation limitations and credits to railroad property).

The Department may criticize and condemn as inappropriate the conclusions of discrimination and remedies reached by the courts to date, but it cannot legitimately claim conflict, inconsistency, or uncertainty.

**c. The Implications of the Decision Below for State Taxing Authorities are Over-Stated and Irrelevant.**

The Department indulges in extensive and somewhat extravagant predictions concerning the effect of

<sup>9</sup> See Ninth Circuit table, App-18. The total value of personal property is \$14.5 billion, of which exempt personal property is \$9.7 billion, or 67%.

the holding here on claims by railroads, and perhaps others, to be free from discriminatory taxation in Oregon and elsewhere. These predictions are over-stated and irrelevant.

Although the Ninth Circuit had only the issue of the Carlines' personal property before it, the Department predicts that the Ninth Circuit's decision will support the conclusion that the real property of railroads must also be protected from tax. Whether this ruling will develop in the Ninth and other circuits remains to be seen, but so far, attempts by the railroads to expand the holding of the case below to real property claims have been unsuccessful.<sup>10</sup> In any event, such prognostication does not support review of the Ninth Circuit's decision at this time. Such an issue is for another case on another day, and presents an issue which should be allowed to develop in the lower courts.

The Petition's reference to the "eruption of litigation" following the decision below is a gross exaggeration. The airline litigation referenced in the Petition was already on file in Oregon prior to the Ninth Circuit's decision, and the airlines had protested payment of their taxes in Washington long before this case was decided. Similarly, railroad litigation was already in progress in Washington. The litigation did not emerge from the decision below—

<sup>10</sup> For example, the Petition cites the current litigation between Burlington Northern Railroad Company and the Department of Revenue of the State of Washington. See Pet., p. 27, footnote 35. The trial judge in those cases has so far denied any preliminary relief sought on the theory that the case below prohibits the taxation of railroad real property in Washington.

these cases arose in response to intolerably discriminatory tax systems.

Finally, the Petition predicts that few statutory schemes can withstand analysis pursuant to the Ninth Circuit's view of Section 306(1)(d). This is most probably a gross overstatement and definitely is premature at this point. In any event, such an impact argument is quite irrelevant to any proper issue under Section 306. By its very nature, Section 306 was intended to have an impact on the states' taxing policies and practices. Certainly, it restricts the freedom which states would otherwise have to discriminate against railroads and rail property. In enacting Section 306, Congress determined in the national interest that tax discrimination against the rail industry should be prohibited whatever the impact on states. As this Court has observed in response to a similar appeal to practical consequences: "These are policy considerations which may have weighed heavily with legislators who considered [Section 306]. It should go without saying that we are not free to reconsider them now."<sup>11</sup> If impact on the states is enough to warrant review in a Section 306 case, then this Court must review every Section 306 case because each case will involve such impact.

The Petition complains that Section 306 jurisprudence develops on a "case-by-case, dispute-by-dispute basis." See Petition at p. 15. This is precisely how the law should develop. To date, the law is clear that Section 306(1)(d) is violated where railroad personal property is taxed, and significant amounts of other

<sup>11</sup> *Burlington Northern v. Oklahoma Tax Commission*, *supra*, 481 U.S. at 1464.

commercial and industrial personal property are exempted from taxation. No conflict exists on that point.

Ultimately, although the point is argued here, whether the Ninth Circuit's decision is correct is not an appropriate consideration for purposes of granting a writ of certiorari. For present purposes, it is enough to note that the Ninth Circuit's decision is consistent with, and in fact embraces the analysis employed by the other circuits in determining claims of discrimination due to statutory exemptions. This Court has previously allowed questions under Section 306 to fully mature and result in conflict before granting a Writ of Certiorari. There is no reason to abandon that approach.

#### CONCLUSION

Although Section 306 is important legislation, the issue raised in this case does not warrant review by this Court. The Petition does not present any ground for granting certiorari under Rule 10 of the Rules of this Court and should be denied.

Respectfully submitted,

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No. 92-74

Supreme Court, U.S.  
FILED

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**In the Supreme Court of the United States**

OCTOBER TERM, 1992

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DEPARTMENT OF REVENUE OF OREGON, PETITIONER

v.

ACF INDUSTRIES, INC., ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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### **QUESTIONS PRESENTED**

1. Whether the Oregon ad valorem property tax discriminates against rail carriers, in violation of 49 U.S.C. 11503(b)(4), by exempting various types of commercial and industrial property other than railroad cars from the tax.

2. Whether, if the state tax violates 49 U.S.C. 11503 (b)(4), the appropriate remedy is to exempt railroad cars from the tax.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1992

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No. 92-74

DEPARTMENT OF REVENUE OF OREGON, PETITIONER

v.

ACF INDUSTRIES, INC., ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

**STATEMENT**

1. The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306 90 Stat. 31, 54 (the 4-R Act), was enacted to improve the operations, structure, physical facilities and financial stability of the railway system of the United States. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 of that Act furthers "the goal of \* \* \* railroad financial security" by establishing "a prohibition on discriminatory state taxation of railroad property." 481 U.S. at 457. See also *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 207 (8th Cir.

1981).<sup>1</sup> As recodified at 49 U.S.C. 11503,<sup>2</sup> Section 306 (b) declares "[t]he following acts" to be unlawful discrimination and provides that the States and their subdivisions "may not do any of them" (49 U.S.C. 11503 (b)):

(i) *Subsection (b)(1)*: the assessment of "rail transportation property"<sup>3</sup> at a higher ratio of its true market value than "other commercial and industrial

<sup>1</sup> As this Court stated in *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)):

The legislative history of the antidiscrimination provision in the 4-R Act demonstrates Congress' awareness that interstate carriers "are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.

Congress concluded in 1975 that, as the result of discriminatory state taxation, "railroads are over-taxed by at least \$50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

<sup>2</sup> The 4-R Act was originally codified at 49 U.S.C. 26c. It was recodified in 1978 at 49 U.S.C. 11503 by the Revised Interstate Commerce Act, §§ 11101, 11503 Pub. L. No. 95-473, 92 Stat. 1419, 1445. As this Court observed in *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), although the statutory language of Section 306 was slightly altered upon its recodification in 1978, the Revised Interstate Commerce Act provides that the change in statutory language "may not be construed as making a substantive change in the laws replaced" (481 U.S. at 457 n.1, quoting Section 3(a) of the Revised Interstate Commerce Act, Pub. L. No. 95-473 92 Stat. 1466). Both versions of the statute are set out in the appendix to the petition (Pet. App. 35a-41a). In this brief, for the reasons explained in *Kansas City Southern Ry. v. McNamara*, 817 F.2d 368, 370 n.2 (5th Cir. 1987), we will refer to the current codification in describing the statute. Subsections (b)(1) through (b)(4) of the current codification—as described in the text—correspond to Sections 306(1)(a) through 306(1)(d) of the 4-R Act (90 Stat. 54). 49 U.S.C. 11503.

<sup>3</sup> The term "rail transportation property" is defined to mean property "owned or used" by railroads. 49 U.S.C. 11503(a)(3).

property"<sup>4</sup> is assessed in the same jurisdiction (49 U.S.C. 11503, derived from Section 306(1)(a) of the 4-R Act);<sup>5</sup>

(ii) *Subsection (b)(2)*: the imposition of a tax based on such an improper assessment ratio (49 U.S.C. 11503(b)(2), derived from Section 306(1)(b) of the 4-R Act);

(iii) *Subsection (b)(3)*: the imposition of an ad valorem property tax on "rail transportation property" at a tax rate higher than the rate applicable to "commercial and industrial property" in the same jurisdiction (49 U.S.C. 11503(b)(3), derived from Section 306(1)(c) of the 4-R Act); and

(iv) *Subsection (b)(4)*: the imposition of "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4), derived from Section 306(1)(d) of the 4-R Act).<sup>6</sup>

2. Oregon imposes an ad valorem tax on real and personal property located within the State (Pet. App. 5a). Various classes of personal property—such as agricultural

<sup>4</sup> The term "commercial and industrial property" is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. 11503(a)(4).

<sup>5</sup> The Act, however, contains an exception that allows the States to assess railroad property at a percentage of its true market value that is as much as 5% greater than the percentage that is applied to non-railroad property. This exception is contained in the provisions that authorize the federal courts to enjoin state violations of the Act. See 49 U.S.C. 11503(c).

<sup>6</sup> As originally enacted, Section 306(1)(d) of the 4-R Act proscribed "any other tax which results in discriminatory treatment of a common carrier by railroad" (Pet. App. 39a). In its recodification as Subsection (b)(4), the language was revised to proscribe "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).



machinery and equipment, business inventories, livestock, poultry, bees and agricultural products in the possession of farmers—are exempt from the State's tax (Ore. Rev. Stat. Ann. § 307.400 (1992)). Some classes of personal property—such as motor vehicles—are exempt from the personal property tax but are subject to registration or other fees in lieu of the property tax (§ 803.585).<sup>7</sup> Railroad cars are classified as personal property and are not exempt from the State's tax (Pet. App. 5a).

Respondents are engaged in the business of leasing railroad cars to shippers and railroads (Pet. App. 22a).<sup>8</sup> Respondents filed this action in federal district court, seeking declaratory and injunctive relief against the assessment and collection of Oregon's personal property tax with respect to their railroad cars. Respondents claimed that, because of the exemptions available for various types of non-railroad commercial property, the state tax violates Subsection (b)(4) because it "discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

As a threshold question, the district court considered whether respondents had standing to raise a claim under this statute (Pet. App. 25a-28a). Respondents are car rental companies and are not themselves "rail carriers." Respondents contended, however, that a tax that discriminates against rail cars necessarily results in discrimination against rail carriers (*id.* at 25a). The court noted that such an argument, pressed to its extreme, "could produce absurd results" (*id.* at 27a).<sup>9</sup> The court

<sup>7</sup> Similarly, various classes of real property—such as standing timber—are exempt from the ad valorem real property tax and are, instead, taxed upon production or severance under a different tax scheme (see Ore. Rev. Stat. Ann. § 321.272 (1992)).

<sup>8</sup> Some of respondents lease nearly all of their cars to shippers; others lease nearly all of their cars to railroads; others lease significant numbers of cars to both (Pet. App. 22a).

<sup>9</sup> As the court stated, "[i]f any company that furnishes products to the railroad industry asserted standing under [Subsection

held, however, that, "given the undisputed close connections between [respondents] and the railroad industry," the link between discriminatory treatment of rail cars and rail carriers is sufficiently clear that respondents have standing to challenge the tax under Subsection (b)(4) (Pet. App. 27a-28a).

On the merits, the district court held that the state tax does not violate the non-discrimination requirements of Subsection (b)(4). The court first noted (Pet. App. 28a) that Oregon assessed railroad property at the same percentage of its true market value as it assessed the other types of commercial property subject to the tax, and thus did not violate Subsection (b)(1) or (b)(2).<sup>10</sup> Oregon also did not apply a different tax rate in taxing railroad property than it applied in taxing non-railroad property, and thus did not violate Subsection (b)(3). See Pet. App. 28a-29a.

The court then addressed whether the State's tax discriminates against railroads in violation of Subsection (b)(4) by wholly exempting various types of non-railroad property from the tax. The court noted that state property taxes that exempted more than 50% of non-railroad commercial property had been found to be impermissibly

(b)(4)], there would be almost no limit to standing" (Pet. App. 27a).

<sup>10</sup> Under Subsection (b)(1), only other property that is "subject to" property tax may be considered in determining whether an improper assessment ratio is being applied to railroad property. See 49 U.S.C. 11503(a)(4); note 4, *supra*. While different assessment ratios for railroad and non-railroad property would violate Subsection (b)(1) (but see note 5, *supra*), the complete exemption of non-railroad property from tax does not violate subsection (b)(1) because exempt property is not "subject to" tax. See, e.g., *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1571 (11th Cir. 1987). The allegedly discriminatory effect of exemptions from the state tax therefore must be considered, if at all, under the non-discrimination requirement of Subsection (b)(4). See 830 F.2d at 1573.

discriminatory under Subsection (b)(4) (Pet. App. 32a, citing *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 470 U.S. 1066 (1989) and *Burlington Northern R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985)). The court stated that, by contrast, the Oregon exemptions protect only 30% of non-railroad commercial property from the state tax (Pet. App. 32a). The court concluded that, even if "there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here" (*ibid.*). The court found no authority for the proposition that "an exemption of approximately 30% [is] impermissibly discriminatory" (*ibid.*).

3. The court of appeals reversed (Pet. App. 1a-19a). With respect to the threshold question of whether respondents have standing to challenge the tax under Subsection (b)(4), the court of appeals agreed with the district court that the statute "prohibits any tax that results in discriminatory treatment of a common carrier by railroad, even if the effect is indirect" (Pet. App. 7a n.2). The court further noted that the State had "apparently abandoned" this issue on appeal (*ibid.*).<sup>11</sup>

On the merits, the court of appeals disagreed with the district court's conclusion that the exemption of a sizeable percentage of non-railroad property under the State's tax scheme is permissible under Subsection (b)(4). In the court's view, "[t]he most natural reading" of the statute is that it "is violated by any exemption given to other taxpayers but not to railroads" (Pet. App. 16a). The court stated that, under the calculation most generous to the State, 25% of non-railroad commercial property is

<sup>11</sup> Petitioner confirms that it no longer challenges respondents' standing under Subsection (b)(4). The petition states that the question of standing "may be considered settled for purposes of review at this level" (Pet. 5 n.5). By this, we take it that petitioner now concedes that, if the State's tax would violate Subsection (b)(4) with respect to rail cars owned by a rail carrier, the State's tax also could not be applied to the rail cars owned by the respondents in this case.

exempt from property tax (*id.* at 18a). The court held that that level of discrimination "far exceeds any possible *de minimis* exception" to Subsection (b)(4) and thus violates the non-discrimination requirement of the statute (Pet. App. 19a).

In reaching that conclusion, the court of appeals rejected the State's claim that Subsection (b)(4) cannot apply to ad valorem property taxes. The State argued that since Subsections (b)(1) through (b)(3) establish specific rules for property taxes, and since Subsection (b)(4) by its terms proscribes discrimination resulting from "any other tax" (or, in the recodified version of the statute, "another tax" (see note 6, *supra*)), the "other tax" referred to in Subsection (b)(4) must be a tax "other" than a property tax. The court rejected that claim because, as several other courts have held,<sup>12</sup> Subsections (b)(1) through (b)(3) do not address taxes that are discriminatory because of undue exemptions; by contrast, Subsection (b)(4) was enacted "to prevent tax discrimination \* \* \* in any form whatsoever" (Pet. App. 12a, quoting *Ogilvie v. State Board of Equalization*, 657 F.2d at 210). Even though exemptions of non-railroad property are excluded from consideration in applying the per se rules of Subsections (b)(1) through (b)(3) to determine whether an improper assessment ratio or tax rate has been applied by the State (see note 10, *supra*), the court held (Pet. App. 12a-13a) that the existence of such exemptions is relevant in evaluating whether the state tax "discriminates against a rail carrier" in violation of Subsection (b)(4).

Having concluded that the exemptions under the Oregon tax impermissibly discriminate against rail carriers in

<sup>12</sup> See *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981); *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987). See also *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416-417 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989).



violation of Subsection (b)(4), the court then considered what remedy should be awarded. The court rejected the State's view that respondents "are only entitled to an exemption for the percentage of their property corresponding to the percentage of all non-railroad property that is exempt" (Pet. App. 19a). Instead, the court held that respondents "were entitled to the same total exemption preferred property owners enjoyed" (*ibid.*). The court therefore directed the district court, on remand, to enjoin the State from collecting its tax on respondents' railroad property.

### DISCUSSION

The court of appeals correctly concluded that a state property tax violates Subsection (b)(4) if, by exempting non-railroad commercial property, the tax "discriminates against" rail carriers (49 U.S.C. 11503(b)(4)).<sup>13</sup> Other courts of appeals have consistently reached that same conclusion, although the supreme court of one State has disagreed.<sup>14</sup>

The courts of appeals have not agreed, however, on the analysis to be applied in determining *whether* a particular state tax scheme effects "discrimination" against rail car-

<sup>13</sup> A threshold question is whether discrimination against property owned by railroad car lessors—such as respondents—establishes discrimination against rail carriers, as the statutory cause of action requires (49 U.S.C. 11503(b)(4)). The courts below concluded that such a nexus exists, at least when railroad rolling stock is involved (Pet. App. 7a n.2). Accord, *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir.), cert. denied, 112 S. Ct. 169 (1991). The issue has, in any event, been waived by petitioner (see note 11, *supra*) and is therefore not presented in this case. There is no doubt that Congress could constitutionally confer standing on respondents; a concrete case or controversy exists with respect to respondents' tax liabilities. Cf. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

<sup>14</sup> Compare cases cited note 12, *supra*, with *Richmond, Fredericksburg & Potomac R.R. v. State Corporation Comm'n*, 230 Va. 260, 336 S.E.2d 896 (1985).

riers. Several different tests have been used. Because of the conflicting analytical methods applied by the courts of appeals, a tax scheme that would be proscribed in one circuit may be sustained in another.

The courts also have not agreed on the proper remedy to be granted when discrimination is found. While crafting a proper remedy necessarily involves a fact-specific inquiry concerning the nature of the discrimination observed, the courts appear nonetheless to have adopted different remedial standards. Some circuits would require the States to adopt a method of taxing railroad property that would place such property in a position equivalent to that of the general mass of non-railroad property in the State. See, e.g., *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 378 (citing cases). Other circuits would require the States to give railroad property the most favored treatment available to any class of non-railroad property. See Pet. App. 19a. The latter rule, as applied in this case (*ibid.*), ordinarily results in complete exemption of railroad property. The former rule ordinarily results in proportional taxation.

The conflicting rules that the courts have employed in determining liability for, and relief from, discriminatory state taxation present questions of significant, recurring importance for the States, for the railroad industry, and for the proper implementation of the federal statutory scheme.

1. Subsections (b)(1) through (b)(3) bar the States from imposing higher assessment and tax ratios for railroad property than for non-railroad property. See 49 U.S.C. 11503(b)(1)-(b)(3). Under the *per se* tests of these Subsections, a court need not consider whether such differential treatment of railroad property constitutes "discrimination." These provisions impose an objective test. The use of differential rates for assessing or taxing railroad and non-railroad property is unlawful without fur-



ther inquiry. See *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 464.<sup>15</sup>

By contrast, Subsection (b)(4) applies only when the court finds that the state tax results in "discrimination" against rail carriers. See 49 U.S.C. 11503(b)(4).<sup>16</sup> As several of the courts of appeals have concluded, Subsection (b)(4) is a "catch all" that proscribes "any other tax" method employed by the State that results in discriminatory treatment of rail carriers. See, e.g., *Department of Revenue v. Trailer Train Co.*, 830 F.2d at 1573 (property tax exemptions); *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 372-373 (gross receipts tax); *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (Subsection (b)(4) "was intended as a catchall provision designed to prevent discriminatory taxation of a railroad carrier by any means"); *Ogilvie v. State Board of Equalization*, 657 F.2d at 209-210 (property tax exemptions).

Thus, while property tax exemptions are not considered in evaluating appraisal and tax ratios under Subsections (b)(1) through (b)(3) (see note 10, *supra*), such exemptions are properly to be considered in determining whether the State has, by this other tax method, effected discrimination against rail carriers. See Pet. App. 13a-

<sup>15</sup> As the Court noted in *Burlington* (481 U.S. at 464), there is an objective, "de minimis" exception for differential assessment ratios under Subsection (b)(1). See also note 5, *supra*. There is no similar exception for differential tax rates under Subsection (b)(3).

<sup>16</sup> "[N]othing in the committee reports, debates, or other legislative history focuses specifically on the purpose of [Subsection (b)(4)]." *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985). As noted in *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 551-552 (4th Cir. 1986), however, the final version of the 4-R Act, as enacted by Congress in 1976, deleted a provision in the proposed bill that would have made Section 306 inapplicable to States whose constitutions mandated specific tax classification schemes and exemptions for various types of property owned within those States.

16a; *Trailer Train Co. v. Leuenberger*, 885 F.2d at 416-418; *Ogilvie v. State Board of Equalization*, 657 F.2d at 209-210. Any other interpretation of Subsection (b)(4) would require the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute. See *Trailer Train Co. v. Leuenberger*, 885 F.2d at 418; *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 552 (4th Cir. 1986); note 10, *supra*.<sup>17</sup>

2. While the courts of appeals have agreed that property tax exemptions may be considered under Subsection (b)(4),<sup>18</sup> they have not agreed on the analysis to be applied in determining whether a tax containing such exemptions "discriminates against" rail carriers (49 U.S.C. 11503(b)(4)). For example, in *Department of Revenue v. Trailer Train Co.*, 830 F.2d at 1574, the Eleventh Circuit stated that, in evaluating whether exemptions are discriminatory, it may be appropriate to "consider the entire tax structure as applied against railroads and as applied against 'all other commercial and industrial busi-

<sup>17</sup> This interpretation of the statute does not, as petitioner contends (Pet. 25), require the conclusion that the broad non-discrimination requirement of Subsection (b)(4) nullifies the specific, objective tests of Subsections (b)(1) through (b)(3). Subsection (b)(4) applies only when the exemptions make the State's tax discriminatory; subsections (b)(1) through (b)(3) apply based upon objective criteria, without a specific finding of "discrimination." Moreover, the court below suggested that some "de minimis" level of exemptions would not be discriminatory under Subsection (b)(4) (Pet. App. 17a-19a). The court concluded that an exemption for 25% of non-railroad property was sufficient to establish discrimination (Pet. App. at 18a).

<sup>18</sup> As noted above, the Supreme Court of Virginia held in *Richmond, Fredericksburg & Potomac R.R. v. State Corporation Comm'n*, 230 Va. at 262, 336 S.E.2d at 897, that Subsection (b)(4) does not apply to ad valorem property taxes. The court reasoned that "the fourth subparagraph does not refer to ad valorem property taxes at all, but rather refers to other or different schemes of taxation not contemplated by the first three subparagraphs." *Ibid.*

nesses by the State.'” *Ibid.* (quoting *Alabama Great Southern R.R. v. Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981)). The Eleventh Circuit held that “discrimination” exists under Subsection (b)(4) only when the State imposes different tax burdens on different types of property and fails “to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.” 830 F.2d at 1574 (quoting *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d at 380 n.4 (emphasis added)). The inquiry into “reasonable distinctions” that would be required under the Eleventh Circuit’s analysis is, of course, inconsistent with the largely unqualified statement of the court of appeals in this case that “any exemption not also available to railroads violates the statute” (Pet. App. 17a).

Other courts have specifically rejected the Eleventh Circuit’s reasoning. The Eighth Circuit held in *Trailer Train Co. v. State Tax Comm’n*, 929 F.2d 1300, cert. denied, 112 S.Ct. 169 (1991), that “under the 4-R Act it is not within our discretion to analyze the disputed tax in the context of [the State’s] overall tax structure.” 929 F.2d at 1303.<sup>19</sup> The Fifth Circuit reached the same conclusion in *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 375. In these courts’ view, the overall fairness of a State’s

<sup>19</sup> In *Trailer Train Co. v. State Tax Comm’n*, 929 F.2d at 1302-1303, the Eighth Circuit concluded that “an [ ] in-depth examination of [the State’s] [complete] tax structure” is not required to evaluate a claim of discrimination under Subsection (b)(4). The court relied for that conclusion on this Court’s decision in *Arizona Public Service Co. v. Sned*, 441 U.S. 141 (1979). In that case, the Court held that, in determining whether a State had violated the federal statute that proscribes a state tax “on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, \* \* \* retailers, or consumers of \* \* \* electricity” (15 U.S.C. 391), it was necessary only to look at “the type of tax the federal statute names, rather than to consider the entire tax structure of the State” (441 U.S. at 150).

tax system is not relevant in determining whether a particular tax discriminates against rail carriers in violation of the statute (929 F.2d at 1303, quoting 817 F.2d at 375):

[The statute] forbids some fair arrangements because the actual fairness of these arrangements is too difficult and expensive to evaluate.

The courts that look only to the challenged tax—and not to the State’s entire tax structure—in evaluating claims of discrimination are not in agreement, however, as to how substantial the different treatment of railroad and non-railroad property must be to violate the statute. In the present case, the court stated that “any exemption not also available to railroads violates the statute,” although the court suggested that “a *de minimis* level” of exemptions *might* be permissible (Pet. App. 17a).<sup>20</sup> That reading of the statute is more absolute than other courts have adopted. In evaluating discrimination claims under Subsection (b)(4), other courts have considered whether the exemptions apply to a “significant portion” of non-railroad property (see *Department of Revenue v. Trailer Train Co.*, 830 F.2d at 1569-1570) or whether the State has singled out railroads as one of a “small group” of taxpayers (see *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 376).<sup>21</sup> Prior decisions addressing the discriminatory effect of property tax exemptions have in-

<sup>20</sup> The court noted (Pet. App. 17a) that, in *Burlington Northern R.R. v. Oklahoma Tax Comm’n*, 481 U.S. at 464, this Court characterized the 5% differential in assessment ratios permitted by 49 U.S.C. 11503(c) as a “*de minimis*” exception to the objective assessment ratio test established in Subsection (b)(1).

<sup>21</sup> See also *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991) (Subsection (b)(4) requires the States to tax “railroads as members of larger taxpayer groups—owners of commercial or industrial property, recipients of gross income, recipients of net income, whatever. [The States] cannot levy a tax on inputs into railroading alone.”).



volved situations in which an unquestionably large portion of the comparable, non-railroad property in the State was exempt. See, e.g., *Trailer Train Co. v. Leuenberger*, 885 F.2d at 418 ("three-fourths of the commercial and industrial personal property in the state is not taxed"). These decisions thus offer no direct support for the ostensibly inflexible bright-line discrimination test adopted by the court in the present case.

The decisions of the several circuits do not reflect a consistent understanding of the content of the prohibition in Subsection (b)(4) against discriminatory state taxation of rail carriers. Absent guidance from this Court, the validity of identical state tax systems would be tested under different standards, leading predictably to different results, based solely upon the circuit in which the tax is assessed.

3. When discrimination has occurred, there remains the question of the proper remedy. In cases involving violations of the equal assessment and tax rate requirements of Subsections (b)(1) through (b)(3), courts have not set aside the state ad valorem property tax in its entirety. Instead, they have required the assessment or tax rate for railroad property to be adjusted to equal that applicable to the general mass of commercial and industrial property subject to the state tax. See *Clinchfield R.R. v. Lynch*, 784 F.2d at 550-551. For example, in *General American Transportation Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986), the court held that, when more than one tax rate is applicable to various classes of property, transportation property may be taxed at a rate reflecting the weighted average of the various rates and need not be taxed at the most favorable rate. Accord *ACF Industries, Inc. v. Arizona*, 714 F.2d 93, 95 (9th Cir. 1983).

In this case, however, the court of appeals rejected the State's contention that the remedy for discriminatory exemptions under Subsection (b)(4) should be "an ex-

emption for the percentage of [railroad] property corresponding to the percentage of all non-railroad property that is exempt" (Pet. App. 19a). The court concluded instead that railroad property should be totally exempt from the State's tax, in order to place railroads in the same position that "preferred property owners enjoy[]" (*ibid.*). The court noted that the same remedy of complete exemption for railroad property had been awarded by the Eighth Circuit in *Trailer Train Co. v. Leuenberger*, 885 F.2d at 418, where the State had exempted three-quarters of all non-railroad commercial property from the state tax.

By contrast, in *Burlington Northern R.R. v. Bair*, 766 F.2d at 1224, the Eighth Circuit held that a "total exemption" for railroad property should not be awarded, even though "ninety-five percent of personal property owners" were exempt from the state tax. The court held, instead, that it was sufficient to provide railroad property owners with the same assessment and tax credit advantages that the State had generally made available to others. *Ibid.* Similarly, in *Clinchfield R.R. v. Lynch*, the Fourth Circuit held that an equitable remedy should be designed to remove only the discriminatory effects of the state tax and not to cause its "total eradication." 700 F.2d 126, 131 n.6 (1983).

The selection of a proper remedy under Subsection (b)(4) is an inherently fact-specific task, since the proper remedy must be designed to address the specific discrimination that has been observed. Nonetheless, the rationales employed by the various circuits in selecting a proper remedy under Subsection (b)(4) have not been consistent. While some courts have sought to design a remedy to provide equivalent treatment for railroad and non-railroad property, other courts (including the court below) have concluded that providing railroads with the "most favored" treatment available under state law is necessary to implement the statutory non-discrimination command.



The selection of a proper remedy is necessarily related to the substantive content of the prohibition to be enforced. For example, a different remedy would be indicated if the statute were construed to prohibit (i) discrimination against railroads as compared with other property owners generally or (ii) discrimination against railroads as compared with any single other, more favored, class of property owners. If the Court determines to grant certiorari on the first question presented in this case, it would therefore also be appropriate for the Court to grant certiorari on the second question, to consider the proper scope of the relief to be awarded for a violation of Subsection (b)(4).

4. As the numerous alternative analyses employed by the various courts of appeals reflect, both the scope of liability and the proper remedy to be selected under Subsection (b)(4) are recurring questions of substantial financial importance to the States and to the railroad industry. Petitioner states that the decision in this case will reduce the State's property tax revenues "at least \$9 million a year" (Pet. 27). The *amicus* MultiState Tax Commission reports (Amended Br. 13-14) that, for the 22 States that responded to its survey, as much as \$107 million of property tax revenues collected from the railroad industry each year could be affected by the decision in this case. To the extent that the States' tax collections are reduced, of course, the railroad industry would benefit commensurately.

The questions presented in this case thus have a significant and recurring importance for the States and the railroad industry. In the absence of guidance from this Court, the answer to these questions will vary based solely upon the circuit in which the particular tax is assessed. In this manner, Congress's goal of imposing a uniform, nation-wide, non-discrimination requirement through enactment of Subsection (b)(4) would be frustrated.

## CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

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OCTOBER TERM, 1992

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
RICHARD A. MUNN, in his Capacity as Director  
of the Department of Revenue of the State of Oregon,  
*Petitioner,*

V.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL ELECTRIC  
RAILCAR SERVICES CORPORATION; PULLMAN LEASING  
COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER  
TRAIN COMPANY; UNION TANK CAR COMPANY,

*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**BRIEF OF THE STATES OF WASHINGTON,  
ARIZONA, CALIFORNIA, FLORIDA, IDAHO,  
INDIANA, IOWA, MONTANA, NEBRASKA, NEVADA,  
NORTH CAROLINA, OKLAHOMA, VIRGINIA,  
WISCONSIN AND WYOMING AS AMICI CURIAE IN  
SUPPORT OF PETITIONER**

---

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**QUESTIONS PRESENTED**

(1) Whether a state imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the state's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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### INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amici curiae* in support of the petitioner, Oregon, and urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of that court in this matter, *ACF Indus., Inc. v. Department of Rev.*, 961 F.2d 813 (9th Cir. 1992) ("*ACF Oregon*"). Since this brief is submitted on behalf of Washington, Arizona, California, Florida, Idaho, Indiana, Iowa, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Virginia, Wisconsin, and Wyoming by their attorneys general, consent to its filing is not required. SUP. CT. R. 37.5.

The principal issue presented here is whether a state imposes a discriminatory tax upon railroad property in violation of the Railroad Reorganization and Regulatory Reform Act of 1976 (the "4R Act") when the state's laws exempt from property taxes any class of property of a type not owned by a railroad.

The amici States are fifteen States within whose borders railroads and carlines carry on extensive transportation operations. The property tax systems of all these States closely parallel Oregon's by granting property tax exemptions, some enjoyed by both railroads and non-railroad businesses and others enjoyed only by non-railroad businesses because of the kinds of property railroads own.<sup>1</sup> All of these amici States potentially will confront the same Hobson's choice that Oregon now faces: either to confine exemptions to the types of property actually owned by railroads, or to forego collection of property taxes from railroads altogether.<sup>2</sup> Six of these States (Arizona, California, Idaho, Mon-

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<sup>1</sup>The relevant provisions of these States' laws are in Appendix A, *infra*.

<sup>2</sup>See Pet. at 26-27. The potential property tax loss to amici States and other fiscal consequences are summarized, *infra*, at 18-19.

tana, Nevada, and Washington) are within the Ninth Circuit and are affected immediately by the decision below.<sup>3</sup> The others, Florida, Indiana, Iowa, Nebraska, North Carolina, Oklahoma, Virginia, Wisconsin, and Wyoming, join in this brief as nonmembers of the Multistate Tax Commission, which is filing a brief as *amicus curiae* on behalf of its thirty-three member States in support of Oregon's Petition for Writ of Certiorari.

### SUMMARY OF ARGUMENT

1. Under the decision below, a state property tax system that exempts any class of property not owned by a railroad without exempting all property owned by that railroad is "discriminatory." The Ninth Circuit's remedy for this "discrimination" is to enjoin collection of any taxes on the railroad's property. Thus, under the Ninth Circuit's interpretation of the 4R Act, a particular railroad's entitlement to property tax immunity turns on whether that railroad owns any property in each class of exempt property. Under this test of discrimination, a State could violate the Act even if a railroad had a greater percentage of exempt property than other commercial and industrial taxpayers. Such a test of discrimination turns the Act on its head. The Ninth Circuit's novel interpretation of the Act leads not only to bizarre results in this case and in other cases to follow in its wake, but also ignores the plain meaning and history of the Act, disregards accepted notions of tax discrimination developed by this Court and other courts, and gravely impairs a State's ability to make sound tax policy judgments without suffering substantial revenue losses.

2. The Ninth Circuit erroneously decides every major issue in this case, in conflict with decisions of many other lower courts. First, 49 U.S.C. § 11503(b)(4) plainly does not apply to property taxes, which are governed instead by the

specific restrictions in subsections (b)(1)-(3). Second, even if Congress somehow intended subsection (b)(4) to apply to property taxes, despite the plain language of the Act, Congress could not have intended courts to scrutinize property tax exemptions under the general terms of subsection (b)(4), so as to render superfluous most of the remainder of § 11503. Third, taxes that are governed by subsection (b)(4) violate § 11503 only if they subject railroads as a class to tax burdens not shared by a significant group of local taxpayers. Fourth, Congress intended violations of the Act to be remedied by taxing railroads in the same manner as most other similarly situated taxpayers, not by granting railroads preferential tax treatment.

3. This case presents important issues of federal law upon which lower courts are divided. The impact of the Ninth Circuit's decision will extend well beyond the personal property taxes Oregon is enjoined from collecting. Few, if any, current state tax systems of any kind could survive scrutiny under the Ninth Circuit's novel interpretation of § 11503. The resulting revenue losses in the Ninth Circuit States alone will be substantial.

### ARGUMENT

#### I. The Ninth Circuit's interpretation of the statute is unworkable and will lead inevitably to bizarre results that Congress could not have intended.

As we discuss in Section II, *infra*, the Ninth Circuit's decision contains several distinct legal errors. The inconsistent and even irrational results the decision may produce, however, graphically highlight its wrong-headed nature. In testing for discrimination under subsection (b)(4), the court formulates a rule that "any exemption not also available to

<sup>3</sup>The two other States within the Ninth Circuit, Alaska and Hawaii, have no similar railroad activities within their borders.



railroads" violates the statute. Pet. App-17.<sup>4</sup> In applying that rule, however, the court holds that an exemption is "available" if, and only if, the particular railroad invoking subsection (b)(4) in fact owns property of the class or type that qualifies for the exemption.<sup>5</sup> For example, if the railroad owns a motor vehicle, then a motor vehicle exemption is "available" to it; otherwise it is not.

The consequences of applying this test are magnified beyond the result reached below, since the Ninth Circuit recognizes that its holding cannot be confined to property taxes. See Pet. App-13. Thus, sales tax, gross receipts tax, and net income tax systems, which typically contain exemptions, credits, and deductions, all are subject to challenge under this "availability" test for discrimination.

<sup>4</sup>The court states that its holding is subject to a "possible qualification" that a *de minimis* level of exemption available only to other taxpayers might not state a claim under § 11503(b)(4). The court expressly declines to decide whether such a *de minimis* limitation to its holding should be implied, however, because the level of exemption for non-railroad property in Oregon—approximately 25% according to the court's calculation—is "far from *de minimis*." Pet. App-17-18. By analogizing to § 11503(c)'s 5% threshold for relief from property tax assessment discrimination when explaining the possible *de minimis* limitation, the court suggests that the aggregate level of exemption would have to be a very small fraction of the total tax base to qualify as *de minimis*. See Pet. App-17; cf. *Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447 (1992) (*de minimis* exception implied in most statutes excuses only trivial deviations from prescribed statutory standards).

<sup>5</sup>Lest there be any doubt that the court below adopts this test, consider the following. The court states that in Oregon 25% of non-railroad property enjoys exemptions "not available to railroads" (business inventories, farm machinery and equipment, and motor vehicles), concluding that this level of exemption "available only to other taxpayers" is "far from *de minimis*." Pet. App-17-19. Oregon's exemptions for business inventories, farm machinery and equipment, and motor vehicles are facially neutral. See *id.* at App-11. Thus, these exemptions are "unavailable" to the plaintiff carlines solely because they do not own property of the types qualifying for the exemptions. See *id.* at App-18-19.

**A. Under the Ninth Circuit's test of discrimination, a state tax system that treats railroads more favorably than any other taxpayer group could be held to discriminate against railroads.**

The Ninth Circuit's interpretation of § 11503 leads to results that Congress could not have intended. For example, assume that a hypothetical state taxes all commercial and industrial property except business inventories, motor vehicles, and railroad cars. Also assume that business inventories and motor vehicles account for 12% and 3% respectively of non-railroad commercial and industrial property in this state; thus, 85% of non-railroad commercial and industrial property is taxed. A railroad (owning railroad cars and motor vehicles accounting for 55% and 5% respectively of its property in the state) sues the state under subsection (b)(4), claiming that the business inventory exemption discriminates against it because it owns no business inventories. Under the Ninth Circuit's holding in *ACF Oregon*, even though the state taxes only 40% of the railroad's property versus 85% of all other commercial and industrial property, the state is enjoined from taxing any of the railroad's property. While this may be an unusual hypothetical, it illustrates the kind of bizarre results that the Ninth Circuit's "availability" test inevitably will produce.

**B. Under the Ninth Circuit's test of discrimination, the same state tax system could be held illegal as to some railroads and legal as to other railroads.**

The Ninth Circuit's "availability" test leads to even more absurd results because it distinguishes irrationally between railroads that have essentially identical operations and asset structures, but only incidental differences in what property they own.

For example, assume that a hypothetical state taxes all commercial and industrial property except business inven-

tories and motor vehicles. Railroad A may own a few motor vehicles and may hold small amounts of business inventories because of a particular feature of its business operations. Railroad B may own a similar number of motor vehicles but no business inventories. Railroad A has "availed" itself of both exemptions, while Railroad B has "availed" itself of only the motor vehicle exemption. Under the Ninth Circuit's interpretation of § 11503, substantially all of Railroad A's property will remain taxable; equivalent property of Railroad B will be immune because of the "unavailability" of the business inventory exemption.<sup>6</sup>

These perverse results would have been avoided if the court below had been faithful to recognized principles of effectuating Congressional intent—principles that other lower courts have correctly applied in 4R Act cases.

## **II. The Ninth Circuit's decision directly conflicts with better reasoned decisions of federal courts of appeal and of state supreme courts.**

### **A. The Ninth Circuit's interpretation of the unambiguous "any other tax" language of subsection (b)(4) to include property taxes addressed in subsections (b)(1)-(3) ignores the plain meaning of subsection (b)(4).**

<sup>6</sup>It should be no answer to argue that Railroad A's competitive disadvantage, flowing as it does from an incidental difference in property ownership, can be alleviated through a reorganization of the railroad's corporate structure or an outright divestiture of the tax-exempt property. Absent some clear legislative expression, courts should not fashion a rule promoting financial restructuring that is without economic substance except for tax purposes.

In *ACF Oregon*, the Ninth Circuit broadly interprets the "any other tax" language of subsection (b)(4)<sup>7</sup> to apply to property tax exemptions, supposedly to effectuate "Congress' purpose" in enacting § 11503. See Pet. App-9-13. In all statutory construction cases, however, the "starting point must be the language employed by Congress," and a court must assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). An earlier Ninth Circuit decision adhered to this precept by pointed reliance on this Court's admonition in *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987), that the plain language of § 11503 controls "in the absence of a clearly expressed legislative intent to the contrary." See *Burlington Northern R.R. v. Blackfoot Tribe*, 924 F.2d 899 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992).<sup>8</sup>

<sup>7</sup>Section 11503(b)(4) prohibits the imposition of "another tax that discriminates against a rail carrier[.]" Section 3061(d) prohibited the imposition of "any other tax which results in discriminatory treatment of a common carrier by railroad[.]" The recodification of § 306 was not meant to change its substantive provisions. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). But see *ACF Oregon*, Pet. App-2. To avoid confusion, we will consistently use the original language from § 3061(d) in discussing § 11503(b)(4).

<sup>8</sup>The railroad in *Blackfoot Tribe* contended that the intent of Congress could not be achieved unless the 4R Act were interpreted to divest Indian tribes of authority to tax on-reservation rights of way, thus limiting the powers of tribes as well as states. *Id.* at 905. Unlike the court below, the *Blackfoot Tribe* panel declined to read into the Act provisions that might better effectuate a perceived statutory policy, particularly where recognized rights (tribal taxing authority) would be abrogated. Cf. *Atchison, Topeka & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442, 1443 (9th Cir. 1986) ("Congress passed the 4-R Act to provide railroads with some protection from the common state practice of discriminatorily taxing rail transportation property." (emphasis added), vacated on other grounds, 828 F.2d 9 (9th Cir. 1987). The parallel between the tribal interests at stake in *Blackfoot Tribe* and the state interests at stake here is abundantly clear.

The Ninth Circuit's construction of subsection (b)(4) in *ACF Oregon* is flatly contradicted by the relevant statutory language. Following in sequence subsections (b)(1)-(3), which proscribe discriminatory property taxes, subsection (b)(4) prohibits the imposition of "any other tax" that "results in discriminatory treatment of a common carrier by railroad[.]" In the context of § 11503(b) as a whole, "other" in subsection (b)(4) obviously means different or distinct. Thus, Congress plainly expressed its intent to forbid discriminatory taxes different or distinct from those it had already specified—i.e., property taxes. This literal reading of subsection (b)(4) is consistent with this Court's direction that the language of § 11503 must "be regarded as conclusive" where the terms of the statute are unambiguous. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

In contrast to the approach of the Ninth Circuit, the Virginia Supreme Court gave effect to the plain language of § 11503, holding that property taxes fall outside the scope of subsection (b)(4):

Arlington County has clearly not imposed "another tax" which discriminates against railroads so as to violate subparagraph 4. The only tax challenged here is the *ad valorem* real property tax regulated by the first three subparagraphs and imposed in full compliance with those provisions. We agree with the [State Corporation Commission] that *the fourth subparagraph does not refer to ad valorem property taxes at all*, but rather refers to other or different schemes of taxation not contemplated by the first three subparagraphs.

*Richmond, Fredericksburg & Potomac R.R. v. State Corp. Comm'n*, 230 Va. 260, 336 S.E.2d 896, 897 (1985) (emphasis added).<sup>9</sup>

<sup>9</sup>In *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, No. 3-91-0066 (M.D. Tenn. July 20, 1992), a federal district court also has held that subsection (b)(4) applies only to taxes other than property taxes.

In *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), a case involving an occupational tax, the Seventh Circuit similarly concluded that subsection (b)(4) does not apply to property taxes:

The federal statute is aimed primarily at property taxes and as to them [in subsections (b)(1)-(3)] it sets forth clear standards designed to prevent the placing of an excess burden on railroads. Subsection (b)(4) is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax. It could be an income tax, a gross-receipts tax, a use tax, an occupation tax as in this case—whatever.

*Id.* at 1186.

The Ninth Circuit's decision in *ACF Oregon* directly conflicts with the Virginia Supreme Court's decision on the same federal question and is contrary to the Seventh Circuit's interpretation. In light of these conflicting interpretations as to the scope of subsection (b)(4), the Court should issue the writ to resolve this question definitively.

**B. By interpreting subsection (b)(4) to forbid any tax exemption not also "available" to a railroad, the Ninth Circuit embraces a "discrimination" test at odds with the political check principle usually applied in this and analogous contexts.**

The meaning of the phrase "any other tax" is not the only question on which there is conflict and confusion in the lower courts. Even more troublesome—in part because it affects all taxes this Court might conclude are governed by subsection (b)(4)—is the question of what constitutes "discrimination" under that provision.

First, a word about the source of the trouble. In contrast to the carefully drawn tests for discrimination in subsections (b)(1)-(3), no test is contained in subsection (b)(4). The subsection merely prohibits "any other tax" that "discriminates" against railroads. To give meaning to subsec-



tion (b)(4), some borrowing obviously is necessary. The important question is: From where?

Once the court below decides that the phrase "any other tax" includes property taxes, it logically should borrow from one of two possible sources: (a) § 11503 itself or, more precisely, the tests embodied in subsections (b)(1)-(3); or (b) the "political check" principle, to be discussed shortly. Borrowing from either source would produce the same result—Oregon's tax would be upheld.

The Ninth Circuit does neither. In effect, the court creates a comparison class to test for discrimination by enlarging the statutory definition of "commercial and industrial property" in subsection (a)(4) by adding back some, but not all, property specifically excluded from the definition. The court gives no reason for omitting from the comparison class still other kinds of excluded property (e.g., agricultural land, charitable personal property, household goods and effects). In the process, the court ignores a crucial element in the statutory definition—the exclusion of property not subject to a property tax levy.<sup>10</sup> This approach to statutory construction, we submit, is judicial license run amuck.

Other circuits, at least in the non-property tax context, have used a more rational approach than the Ninth Circuit; they have borrowed and applied the "political check" principle in subsection (b)(4) cases. For examples, see *Kansas City Southern Ry. v. McNamara*, 817 F.2d 368, 375 (5th Cir.

<sup>10</sup>The definition of "commercial and industrial property" includes all "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." The Ninth Circuit apparently feels free, in a subsection (b)(4) case, to reach into this definition and to apply any elements it chooses, while disregarding the others, all in the name of effectuating congressional intent.

1987), and *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991).<sup>11</sup>

The political check principle originally was developed as a test to determine whether a state or local tax system discriminates against the federal government or those dealing with the federal government. Although the principle has its roots in *M'Culloch v. Maryland*, 4 Wheat 316 (1819), its more recent development is in *Washington v. United States*, 460 U.S. 536, 545 (1983), and *United States v. County of Fresno*, 429 U.S. 452, 462-63 (1977). As stated in *Washington v. United States*:

A "political check" is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government.

460 U.S. at 545.<sup>12</sup>

<sup>11</sup>The carlines apparently agree with our characterization of these cases. In a brief in opposition submitted to this Court in another 4R Act case, *Trailer Train Company, Railbox Company, and Railgon Company*, three of the same plaintiff carlines who initiated the instant case, stated:

Every decision by a United States Court of Appeals interpreting [subsection (b)(4)] has made clear that any tax that is imposed generally on other commercial and industrial taxpayers may also be imposed on railroads and railcar companies. See, e.g., *Burlington Northern R.R. Co. v. City of Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991) (state is confined to taxing railroads as members of larger taxpayer groups such as owners of commercial and industrial property or recipients of gross receipts or net income); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987) ("We think the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial taxpayers'").

Br. of Resp'ts in Opp'n to Pet. for Writ of Cert. at 3-4, *State Tax Comm'n v. Trailer Train Co.* (No. 91-20).

<sup>12</sup>This Court uses a similar analysis in determining whether a state tax violates the Free Press Clause of the First Amendment. See *Leathers v. Medlock*, 111 S. Ct. 1438 (1991).

The anomaly of adopting an "availability" rather than a "political check" test should now be apparent. The Ninth Circuit deems Congress to have provided railroads with protection from state taxation far broader than that developed by this Court for the federal government itself.<sup>13</sup> Moreover, in the Ninth Circuit at least, this is so whether the tax involved is: a property tax, a gross receipts tax, a sales tax, or any other kind of tax. The Fifth and Seventh Circuits, however, presumably will continue to apply the political check principle, just as they did in *McNamara* and *City of Superior*.<sup>14</sup> As to which test other circuits will apply in the future

<sup>13</sup>We do not suggest, of course, that Congress lacks the power to produce such an anomalous result, but that such a result should rest on a much firmer basis than the language of subsection (b)(4). We also recognize that the political check principle will not validate a state tax system that treats the state itself (or those dealing with it) more favorably than it treats the federal government (or those dealing with it). Cf. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

<sup>14</sup>The anomaly becomes greater if one compares the decision below with the Ninth Circuit's own earlier decision in *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860 (9th Cir.), cert. denied, 464 U.S. 846 (1983). There, two of the same carlines as in *ACF Oregon* claimed that California violated subsection (b)(3) by attempting to tax their railroad cars at a tax rate higher than the two tax rates imposed on most other commercial and industrial property. The Ninth Circuit held that the tax rate applicable to the majority of commercial and industrial property would be the rate to be applied to the carlines. 697 F.2d at 867.

In so holding, the court discussed the overall purpose of § 11503:

[T]he use of the rate applicable to the majority of the commercial and industrial property adequately satisfies the basic purpose of § 11503, which is to prevent states from discriminatory taxation of rail-transportation property. As long as the majority of commercial and industrial property is taxed at the same rate as rail-transportation property, the owners of such commercial and industrial property can be expected to provide a strong check against any state discrimination.

*Id.* at 867 n.11.

We agree. Yet in its discrimination analysis in *ACF Oregon*, the Ninth Circuit abandons this approach for no apparent reason, without even discussing this critical aspect of *Trailer Train*.

cases that inevitably will be brought under subsection (b)(4), one can only guess.

**C. By granting railroads a preferred tax-exempt status as the remedy for discrimination, the Ninth Circuit ignores Congress' recognized intent to relieve railroads only from unfair tax burdens.**

The Ninth Circuit's arbitrary application of § 11503 carries over to the remedy issue. The plaintiff carlines now are fully exempt from Oregon property taxes. But why?

As Oregon points out in its petition, in fashioning relief under subsections (b)(1) through (b)(3), the lower courts uniformly have concluded that railroads may be relieved only of taxes that exceed the average tax imposed in a jurisdiction. See Pet. at 24. This remedy implements a congressional policy reflected in these very subsections.<sup>15</sup> Simply stated, this policy is: no tax discrimination against railroads—but no tax preferences for them either. Yet the Ninth Circuit now concludes that Congress, in enacting subsection (b)(4), changed its mind and abandoned this policy.

The language Congress used in the original version of the 4R Act shows that Congress did not abandon the policy. Section 306(2) is the jurisdictional provision of the Act. It carves out an exception to 28 U.S.C. § 1341, the Tax Injunction Act, by conferring on federal courts jurisdiction to grant such injunctive and other relief "as may be necessary to prevent, restrain or terminate any acts in violation of this section." Section 306(2) (emphasis added) (reproduced at Pet. App-39-40). The Ninth Circuit's grant of tax preferences to

<sup>15</sup>With respect to subsections (b)(1) and (b)(2), this policy is most clearly reflected in the phrase "(but only to the extent of any portion based on excessive values as hereinafter described)," which appears in the original version of subsection (b)(1). Similarly, the original version of subsection (b)(3) prohibits only the application of "a tax rate higher than the tax rate generally applicable to commercial and industrial property." See §306(1) (reproduced at Pet. App-39).



the carlines can hardly be characterized as "necessary" to eliminate discrimination against interstate commerce. In this vein, one other circuit court has rejected the claim that a finding of discrimination under § 11503(b)(4) warrants total immunity from the tax in issue as opposed to a form of relief that eliminates the incremental portion of the discriminatory tax. *Burlington Northern R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985).<sup>16</sup>

**III. The Ninth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.**

**A. This case presents an issue similar to one to which this Court previously gave plenary consideration on appeal but did not decide.**

In *Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106 (1985), the South Dakota Supreme Court rejected four airlines' claims that a South Dakota property tax violated the Airport and Airway Improvement Act of 1982, 49 U.S.C. App § 1513(d), a statute modeled on the 4R Act. South Dakota taxed the airlines' personal property while exempting most other personal property. As in the 4R Act, assessment ratios or tax rates applied to airline property are tested for discrimination under § 1513(d) by comparing them to the ratios or rates applied to other "commercial and industrial property," which is defined identically in both

<sup>16</sup>No persuasive basis exists for reconciling the holding in *Bair* with the result the Eighth Circuit later reached in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied sub nom. *Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989), which granted carlines full exemptions from personal property taxes upon finding that Nebraska's law exempted an aggregate 75% of personal property owned by other businesses. Even assuming the *Leuenberger* court might have conferred an equivalent remedy in a situation comparable to Oregon's, the conflicts between *Bair* and *ACF Oregon* and between *Bair* and *Leuenberger* are representative of the confusion that exists in the lower courts over these recurring issues.

Acts. Compare § 1513(d)(2)(D) with § 11503(a)(4). The State Supreme Court rejected the airlines' discrimination claims because they were based on a comparison between taxed airline property and exempt property not "subject to a property tax levy." 372 N.W.2d at 110.

The airlines appealed, challenging the State Supreme Court's interpretation of "commercial and industrial property" under § 1513(d).<sup>17</sup> This Court noted probable jurisdiction<sup>18</sup> but affirmed on alternative grounds, without reaching the question of the interpretation of "commercial and industrial property" under § 1513(d). *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 129 (1987). Thus, the conflict in the lower courts over the meaning and effect of this definition has yet to be resolved.<sup>19</sup>

<sup>17</sup>In their jurisdictional statement, the airlines asserted that resolution of the issue would affect the property taxation of 92 commercial airlines, 397 railroads, and 34,000 motor carriers, collectively owning more than \$76 billion in property. Juris. Statement at 6, 11-12, *Western Air Lines* (No. 85-732).

<sup>18</sup>After this Court noted probable jurisdiction, the Railway Progress Institute and the Association of American Railroads filed a brief on the merits supporting the airlines, in which they agreed that the case raised "an important issue of statutory construction." Br. Amici Curiae Railway Progress Institute & Association of American Railroads at 1, *Western Air Lines* (No. 85-732).

<sup>19</sup>As Oregon correctly states, the lower courts uniformly have concluded that the definition of "commercial and industrial property" in § 11503(a)(4) means that railroads cannot base a claim of assessment or rate discrimination under § 11503(b)(1) or (3) on a comparison class that includes exempt property. See Pet. at 10. The North Dakota Supreme Court, however, has concluded that virtually identical provisions in 49 U.S.C. App § 1513(d) do allow airlines to base a claim of assessment discrimination on a comparison class that includes exempt property. *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W.2d 515 (N.D. 1984). The North Dakota Supreme Court's interpretation of § 1513(d) directly conflicts with the South Dakota Supreme Court's interpretation of § 1513(d) in *Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106 (1985), aff'd on other grounds sub nom. *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987). This Court initially accepted *Western Air Lines* to resolve that conflict.



The interpretation of the identical definition of "commercial and industrial property" in the 4R Act is a central issue in *ACF Oregon*. As Oregon correctly observes, by enacting this definition Congress could not have intended to allow states to grant property tax exemptions under subsections (b)(1)-(3) while simultaneously intending to invalidate their taxation of railroad property under subsection (b)(4) the moment they do. Pet. at 10-11, 16.<sup>20</sup>

**B. The Ninth Circuit's expansive discrimination and remedial holdings cannot logically be limited to property taxes.**

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<sup>20</sup>The decision below fundamentally conflicts with *ACF Indus., Inc. v. Arizona*, 714 F.2d 93 (9th Cir. 1983) ("*ACF Arizona*"), where virtually the same carlines as in *ACF Oregon* claimed that Arizona violated subsection (b)(1) by exempting business inventories while taxing railroad property in full. In *ACF Arizona*, the Ninth Circuit summarily rejected the carlines' interpretation of the Act:

The Carlines' first claim is that the state ought to include in its calculation of commercial property all the business inventories in the state (which are categorically exempt from ad valorem taxes) in determine the assessment ratio. This claim has nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored.

*Id.* at 94.

In *ACF Oregon*, the Ninth Circuit holds that *ACF Arizona* is "simply inapposite," explaining that, unlike subsections (b)(1)-(3), the broad language of subsection (b)(4) is not restricted by the comparison class of "other commercial and industrial property." Pet. App-15-16. In deciding whether Oregon's property tax system discriminates against the carlines under subsection (b)(4), however, the court below compares the tax treatment of the carlines' property with the treatment of *other commercial and industrial property*, without a satisfactory explanation for its refusal to give effect to the statutory definition of "commercial and industrial property" in § 11503(a)(4). Thus, by adopting its novel interpretation of subsection (b)(4), the court below mysteriously transforms an argument that "has nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored" into a juggernaut that will compel states either to alter their tax systems drastically or to abandon taxation of railroads altogether.

If the Ninth Circuit really means what it says in *ACF Oregon*, the implications are likely to reach far beyond the disruption of state property tax systems as described in Oregon's petition. The logical extension of the Ninth Circuit's reasoning means that railroads and carlines should possess absolute immunity from virtually every state or local tax.

If this sounds alarmist, consider the following. First, in *ACF Oregon*, the Ninth Circuit obviously interprets the phrase "any other tax" in subsection (b)(4) to include all types of non-property taxes, *i.e.*, sales taxes, gross receipts taxes, net income taxes, or any others. See Pet. App-13. Second, under the "availability" test of discrimination, an exemption is not "available" to a railroad unless the railroad can in fact take advantage of the exemption. Logically, this "availability" test should apply not only to exemptions, but to credits, deductions, or any other form of favorable tax treatment. Just as the type of tax should not matter, the method of conferring the tax benefit or its label should not matter either.<sup>21</sup> Third, once a court finds an offending tax benefit within a tax system, the proper remedy—according to the Ninth Circuit—is to immunize the railroads completely from taxation under that system. See Pet. App-19.

The three factors in combination make up the lethal mix for the states.

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<sup>21</sup>For this reason, the Ninth Circuit's discrimination holding in *ACF Oregon* directly conflicts with the Fourth Circuit's decision in *Richmond, Fredericksburg & Potomac R.R. v. Department of Tax'n*, 762 F.2d 375, 380-81 (4th Cir. 1985), holding that Virginia's corporate net income tax did not discriminate against the plaintiff railroad under subsection (b)(4) by denying the railroad an "Extra Depreciation Deduction" extended to many other commercial and industrial taxpayers.

For the same reason, we believe the decision below also directly conflicts with the Sixth Circuit's recent decision in *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548 (6th Cir. 1992), affirming the denial of a preliminary injunction to a railroad claiming that Tennessee violated subsection (b)(4) by exempting business inventories.

**C. The likely fiscal impact of the decision of the Ninth Circuit upon the states will be substantial.**

The court below immunizes the plaintiff carlines from any taxes upon property they hold. While the carlines sought and obtained relief from personal property taxation only, the railroads, armed with this decision, now contend they are entitled to immunity from all property taxes, real as well as personal.<sup>22</sup>

In effect, the railroads urge that Congress intended to absolve them from any obligation to pay a tax of general applicability that traditionally has been used to fund the essential costs of state and local governments. Nationwide, recent railroad net investment has been estimated to exceed \$36.8 billion, with operating revenues calculated at \$27.9 billion.<sup>23</sup> Trackage approximates 176,360 miles.<sup>24</sup>

The railroad industry's own recent submission to this Court indicates that taxes paid upon such values by Class I railroads, only, approach \$281 million.<sup>25</sup> Since economic in-

<sup>22</sup>See, e.g., *Burlington Northern R.R. v. Department of Rev.*, No. C92-5178WD (W.D. Wash. filed April 30, 1992). See also *Burlington Northern R.R. v. Department of Rev.*, No. 92-585RE (D. Or. filed May 7, 1992); *Portland Terminal R.R. v. Department of Rev.*, No. 92-607FR (D. Or. filed May 13, 1992).

<sup>23</sup>INTERSTATE COMMERCE COMMISSION, 1990 ANNUAL REPORT 115. Totals shown are for Class I line-haul railroads. Under carrier classifications adopted by the ICC, Class I railroads are carriers with annual operating revenues in excess of an amount that is annually adjusted for inflation. In 1989 the revenue threshold was \$93.5 million. Class I railroad systems represent three percent of railroads in the country but account for ninety-one percent of freight revenue. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 3 (1990 ed.).

<sup>24</sup>*Id.* at 44.

<sup>25</sup>See Br. Amicus Curiae of Association of American Railroads at 14, *Chesapeake W. Ry. v. Tax Comm'r* (No. 91-1198). The jurisdictional statement submitted in *Western Air Lines, Inc. v. Board of Equalization* (No. 85-732) then placed the value of operating property for interstate railroads at more than \$43 billion.

centives such as inventory and agricultural exemptions are widespread, the railroads clearly contend that they should be relieved of a substantial portion of these taxes. The potential consequences from the decision below for Ninth Circuit States are consistent with these nationwide totals. In addition to the possible property tax loss in Oregon, estimated at \$9 million, other affected Ninth Circuit States have at risk more than \$40 million in property tax revenues. If the rationale of *ACF Oregon* were extended nationwide to immunize railroads from state and local income and sales taxes, the additional potential loss could be estimated conservatively at \$100 million.<sup>26</sup>

This sweeping entitlement claim by railroads comes when states are confronting budget crises as acute as any in recent years.<sup>27</sup> *ACF Oregon's* pending disruption of essential state and local government functions thus could be far-reaching and lingering. However unwarranted and unnecessary such upheaval may be, this situation now confronts the states because of a lower court decision that fundamentally errs in interpreting Congress' intent in addressing these intersecting areas of interest within the federal system.

<sup>26</sup>ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 16 (1990 ed.). Aggregate taxes paid by railroads in 1989 to state and local governments and to the federal government (other than for federal payroll and income taxes) exceeded \$500 million.

<sup>27</sup>Decreasing revenue collections forced thirty-five States to reduce fiscal 1992 budgets as earlier enacted by a total of \$5.748 billion. NATIONAL GOVERNORS' ASSOCIATION & NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, FISCAL SURVEY OF THE STATES 5, 11 (1992). Beyond the current economic recession, an increasing national debt and current ceilings on federal domestic spending are cited as sources of continuing pressures on the fiscal health of the states. See NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE BUDGET AND TAX ACTIONS 39 (1991).

**CONCLUSION**

For the reasons stated above, this Court should grant Oregon's Petition for Writ of Certiorari.

DATED this 6th day of August, 1992.

Respectfully submitted,  
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**APPENDIX****STATE TAX EXEMPTIONS - SUMMARY<sup>1</sup>**

<u>State</u>	<u>Business Inventory</u>	<u>Motor Vehicles</u>	<u>Farm Machinery and Equipment</u>
Arizona	X	X	
California	X	X	
Florida	X	X	
Idaho	X	X	
Indiana		X	
Iowa	X	X	X
Montana	X		X
Nebraska	X		X
Nevada	X	X	
North Carolina	X		
Oklahoma	X	X	
Virginia	X	X	X
Washington	X	X	
Wisconsin	X	X	X
Wyoming	X	X	

<sup>1</sup>Pages 2a-4a of the Appendix contain citations to the specific governing provisions for each State.



# STATE TAX EXEMPTIONS - BUSINESS INVENTORIES

Arizona	Ariz. Const. art. IX sec. 2(1)
California	Cal. Rev. Tax Code § 219 (West 1987)
Florida	Fla. Stat. ch.196.185 (1991)
Idaho	Idaho Code § 63-105Y (1989)
Indiana	none
Iowa	Iowa Code Ann. § 427A.10 (West 1990)
Montana	Mont. Code Ann. § 15-6-202 (1991)
Nebraska	Neb. Rev. Stat. § 77-202(7) (Supp. 1991)
Nevada	Nev. Rev. Stat. § 361.068 (1991)
North Carolina	N.C. Gen. Stat. § 105-275(34) (Supp. 1991)
Oklahoma	Okla. Stat. Ann. tit. 68 § 2805(10) (West 1992)
Virginia	Va. Code Ann. § 58.1-3509 (Michie 1991) Va. Const. art. X sec. 4
Washington	Wash. Rev. Code. § 84.36.477 (1989)
Wisconsin	Wis. Stat. Ann. § 70.111(17) (West Supp. 1991)
Wyoming	Wyo. Stat. § 39-1-201(xii) (Supp. 1991)

# STATE TAX EXEMPTIONS - MOTOR VEHICLES

Arizona	Ariz. Const. art. IX sec. 11
California	Cal. Rev. & Tax. Code § 10758 (West Supp. 1992)
Florida	Fl. Const. art. VII sec. 1(b)
Idaho	Idaho Code § 63-105P (1989)
Indiana	Ind. Code Ann. § 6-1.1-2-7 (Burns Supp. 1992)
Iowa	Iowa Code Ann. § 321.130 (West Supp. 1992)
Montana	none
Nebraska	none
Nevada	Nev. Rev. Stat. § 361.067 (1991)
North Carolina	none
Oklahoma	Okla. Stat. Ann. tit. 68 § 2805(2) (West 1992)
Virginia	Va. Code Ann. § 58.1-3500 (Michie 1991) Va. Const. art. X sec. 4
Washington	Wash. Rev. Code § 82.44.130 (1989)
Wisconsin	Wis. Stat. Ann. § 70.112(5) (West 1989)
Wyoming	Wyo. Stat. § 39-1-201(xiii) (Supp. 1991)

**STATE TAX EXEMPTIONS - FARM MACHINERY  
AND EQUIPMENT**

Arizona	none
California	none
Florida	none
Idaho	none
Indiana	none
Iowa	Iowa Code Ann. § 427A.10 (West 1990)
Montana	Mont. Code Ann. § 15-6-201 (p) (1991)
Nebraska	Neb. Rev. Stat. § 77-202(6) (Supp. 1991)
Nevada	none
North Carolina	none
Oklahoma	none
Virginia	Va. Code Ann. § 58.1-3503(B) (Michie 1991) Va. Const. art. X sec. 4
Washington	none
Wisconsin	Wis. Stat. Ann. § 70.111(10) (West Supp. 1991)
Wyoming	none

**MOTION FILED**  
**AUG 5 1992**

No. 92-74

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**In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1992**

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DEPARTMENT OF REVENUE OF THE STATE OF  
OREGON, RICHARD A. MUNN,  
in his capacity as Director of the Department  
of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL  
ELECTRIC RAILCAR SERVICES CORPORATION;  
PULLMAN LEASING COMPANY; RAILBOX  
COMPANY; RAILGON COMPANY; TRAILER TRAIN  
COMPANY; UNION TANK CAR COMPANY,

Respondents.

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

---

**MOTION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF IN SUPPORT OF PETITIONER AND BRIEF  
OF THE MULTISTATE TAX COMMISSION IN  
SUPPORT OF PETITIONER'S WRIT  
FOR CERTIORARI**

---

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF IN SUPPORT OF PETITIONER**

**TO THE HONORABLE CHIEF JUSTICE AND  
THE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES:**

Pursuant to Rule 37.2, the Multistate Tax Commission (hereinafter, the "Commission") respectfully moves the Court for leave to file the accompanying amicus curiae brief in support of Petitioner.<sup>1</sup> The Commission requested the written consent of all parties to the case. Respondents ACF Industries, Inc., General American Transportation Corporation, General Electric Railcar Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company, and Union Tank Car Company refused to grant their consent.

The Commission is the administrative arm of the Multistate Tax Compact (hereinafter, the "Compact"). ALL ST. TAX GUIDE, ¶701 *et seq.* (RIA 1992); ST. TAX GUIDE, ¶351 (CCH 1992). The Commission currently has nineteen full member States and fourteen associate

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<sup>1</sup>The National Association of Counties also joins in filing the accompanying brief. The National Association of Counties is the only national representative of county government in America. Its missions are to enhance the role of counties in our federal system and to assist county officials in the cost efficient service of the needs of their constituents.

member States.<sup>2</sup> The expressly stated purposes of the Commission are to facilitate proper determination of state and local tax liability of multistate taxpayers; to promote uniformity and compatibility in state tax systems; to facilitate taxpayer convenience and compliance in the filing of tax returns and in tax administration; and to avoid duplicative taxation. In addition to fulfilling the Compact's expressly stated purposes, the Commission, among other things, has historically stood guard against unwarranted federal pre-emption of state taxation. This role of the Commission has resulted from its historical roots--the Compact was developed in 1967 in direct response to proposed federal legislation that would have directed how States were required to tax multistate businesses. See, Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N. REV. 1, 1 and 23. The validity of the Compact was recognized by this Court in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452 (1978).

The issues presented in this case are of substantial consequence to the Commission, because they bear directly upon the manner in which the Commission's member and associate member States

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<sup>2</sup>The current full members are the States of Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Alabama, Arizona, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia.

have implemented their property tax systems in our federal system of government that presupposes States with autonomous taxing authority. The property tax is the primary revenue for the legally and politically required services of local government. Without attempting to ascertain Congress' express pre-emptive intent in the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter, the "4-R Act) consistent with the Court's established jurisprudence, the Ninth Circuit's decision has placed state property taxation at risk.

The Commission's role in preventing unwarranted federal pre-emption relevant here takes the form of its Multistate Property Tax Project. This project addresses problems regarding taxation of "centrally assessed" properties that have received or are attempting to receive special congressional protection. The Commission, among other things, has encouraged Congress to amend §306 of the 4-R Act. In furtherance of that objective, the Commission has developed data on the fiscal impact visited on the States as a result of litigation under §306 of the 4-R Act and the unrestricted and expansive judicial interpretations of that section. The Commission views with concern the litigation under the 4-R Act that has expanded federal pre-emption of state taxation of railroads and affiliated industries without any proper consideration of the perspective with which expressly pre-emptive federal legislation should be interpreted under the Court's existing jurisprudence.

The compromise of existing state property tax systems that result from decisions like the case at bar is destructive to state sovereignty because the revenues of property taxes are largely dedicated to supporting fundamental public services and benefits which largely support our national economy and maintain this country's global competitiveness. It is plainly apparent that the hardship imposed by the Ninth Circuit's decision, if extended to other States, will be imposed upon the States and their citizens at a point in time when they are already suffering from fiscal stress. In the Commission's view, expansive interpretations of federal pre-emptive statutes are contributing to deterioration of state fiscal affairs. The Commission desires to submit its *amicus curiae* brief to apprise the Court of these concerns as a backdrop to the Court's determination of review.

WHEREFORE, it is respectfully requested that leave be granted for the Multistate Tax Commission to file the accompanying *amicus curiae* brief addressing the issue of why this case should be heard.

Respectfully submitted,

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August 6, 1992



No. 92-74

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

---

DEPARTMENT OF REVENUE OF THE STATE OF  
OREGON, RICHARD A. MUNN, in his capacity as  
Director of Revenue of the Department of Revenue of  
the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL  
ELECTRIC RAILCAR SERVICES CORPORATION;  
PULLMAN LEASING COMPANY; RAILBOX  
COMPANY; RAILGON COMPANY; TRAILER TRAIN  
COMPANY; UNION TANK CAR COMPANY,

Respondents.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF AS AMICUS CURIAE IN SUPPORT  
OF PETITIONER'S WRIT FOR CERTIORARI

## QUESTIONS PRESENTED

(1) Whether a State imposes a discriminatory tax on railroad property, in violation of §306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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**In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1992**

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DEPARTMENT OF REVENUE OF THE  
STATE OF OREGON, Petitioner,

v.

ACF INDUSTRIES, INC., *et al.*, Respondents.

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

---

**BRIEF OF THE MULTISTATE TAX COMMISSION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER'S  
WRIT FOR CERTIORARI**

---

**STATEMENT OF INTEREST**

The Multistate Tax Commission (hereinafter, the "Commission") is the administrative arm of the Multistate Tax Compact (hereinafter, the "Compact"). ALL ST. TAX GUIDE

¶701 *et seq.* (RIA 1992); ST. TAX GUIDE ¶351 (CCH 1992). Nineteen States, including the District of Columbia, have adopted the Compact and are full member States of the Commission. In addition, fourteen States are associate members. The expressly stated purposes of the Commission are to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. *Id.* The Court recognized the validity of the Compact in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452 (1978).

In addition to fulfilling the Compact's expressly stated purposes, the Commission, among other things, has historically stood guard against unwarranted federal pre-emption of state taxation. This role of the Commission has resulted from its historical roots--the Compact was developed in 1967 in direct response to proposed federal legislation that would have dictated how States were required to tax multistate businesses. See Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N. REV. 1, 1 and 23. In this spirit, the Commission has attempted, but not always successfully,<sup>1</sup>

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<sup>1</sup>Limited resources hinder the Commission. Congress also often fails to notify the States when it contemplates pre-emptive legislation. For example, 49 U.S.C.A. §1513(f) (West Supp. 1991) was adopted in the waning hours of the 101st Congress without prior public exposure. Section 1513(f) raises innumerable construction issues that seriously impact on state taxation of the air carrier industry. See Mines, *Congress Disrupts State Taxation of Air Carriers Through Passage of 49 U.S.C. §1513(f)*, 1991 MULTISTATE TAX COMM'N. REV. 1.

to prevent unwarranted federal pre-emption of state taxation.

One of the Commission's efforts to defend against unwarranted federal pre-emption is its Multistate Property Tax Project which addresses problems regarding taxation of "centrally assessed" properties that have received special congressional protection, particularly railroads and their affiliated industries. Under the auspices of the Multistate Property Tax Project, the Commission, among other things, has encouraged Congress to amend §306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter, the "4-R Act"). In furtherance of that objective, the Commission has developed data on the fiscal impact visited on the States as a result of litigation under §306 of the 4-R Act and the unrestricted and expansive judicial interpretations of that section. The Commission views with concern the litigation under the 4-R Act that has expanded federal pre-emption of state taxation of railroads and affiliated industries without any proper consideration of the perspective with which expressly pre-emptive federal legislation should be interpreted under the Court's existing jurisprudence.

### SUMMARY OF ARGUMENT

The Court should grant the petition for the writ of certiorari because the Ninth Circuit's decision violates this Court's existing jurisprudence that is protective of federalism and, therefore, conflicts with the applicable decisions of this Court. Failure to review this case which would otherwise provide clarity on how the lower courts should determine the

express intent of Congress to pre-empt long-standing, state tax practices will encourage other courts to adopt the Ninth Circuit's flawed interpretative stance. It is particularly important that the Court address this issue because taxpayer use of pre-emption arguments to invalidate long-standing, state practices is increasing. Guidance emanating from Our Federalism is needed specifically in this case, because Congress did not state in adopting the 4-R Act that the existence of state property tax exemptions, however neutral or fairly distributed, would constitute a violation of the Act. Leaving the Ninth Circuit's decision unreviewed will cause States and their citizens to suffer substantial hardship.

#### ARGUMENT.

- I. THERE IS A NEED FOR THE COURT TO STATE CLEARLY THE APPLICABLE STANDARD FOR DETERMINING THE EXTENT OF PRE-EMPTION BY A FEDERAL STATUTE THAT IS EXPRESSLY PRE-EMPTIVE OF STATE TAXATION, BECAUSE LOWER COURTS HAVE REPEATEDLY CONSTRUED THE 4-R ACT IN A MANNER THAT CONFLICTS WITH THE COURT'S EXISTING JURISPRUDENCE.

**A. The Determination Of The Extent Of Pre-Emption By An Expressly Pre-Emptive Federal Statute Is In The First Case A Determination Of The Stated Intent of Congress.**

There are several recognized tools for a federal court

to employ when interpreting a federal law that impacts on State powers. See Petition and Brief of *Amici*, State of Washington, *et al.* Pre-emption analysis using the Court's existing jurisprudence is one of those tools. The Ninth Circuit's analysis of §11503(b)(4)<sup>2</sup> lacks any sensitivity to the impact of its decision on our federal form of government. The Ninth Circuit's decision factors in no moment of concern for interpreting a federal statute as pre-emptive of a long-standing, state tax practice without the support of a clear congressional intent emanating from express statutory language. Specifically, the decision is devoid of any consideration of the Court's existing jurisprudence that applies to congressional legislation pre-empting fundamental or core state sovereign powers. This erroneous approach resulted in the Ninth Circuit's misinterpretation of §11503(b)(4).

Congress (but not the courts) enjoys broad legislative powers under the Commerce Clause even when congressional legislation pre-empts fundamental and core state sovereign powers. Nonetheless, the protection of federalism lies in the political process by which such legislation is adopted. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537-554 (1985), and *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). The requirement for Congress to speak its pre-emptive intent clearly provides

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<sup>2</sup>Because the language of the original §306 was first codified at 49 U.S.C. §26c and was altered slightly when the act went into effect three years later (recodified as 49 U.S.C. §11503 (1988)), the Commission adheres to the convention followed by Oregon in its Petition. See Petition at 3-4, notes 3 and 4.



a guarantee for the political process protection, and the courts are not empowered by the Constitution to supply a missing intent. *United States v. Bass*, 404 U.S. 336, 349-350 (1971). The determination of Congress' pre-emptive intent is in the first instance a determination of congressional intent as embodied in the legislation. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738-740 (1985).

Oregon and *Amici*, State of Washington, *et al.*, have fully developed why the Ninth Circuit's interpretation given to §11503(b)(4)'s "any other tax" provision fails to square with the congressional intent as reflected from the plain meaning of the language used by Congress in §11503(b)(4) and in §11503(b)(1)-(3). Section 11503(b)(4) simply cannot be construed in the manner of the Ninth Circuit, because its construction of §11503(b)(4) renders the specific provisions of §11503(b)(1)-(3) surplusage. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Moreover, an ambiguous provision of a statute has to be construed in context with other provisions of the same statute and harmonized as a whole. *Stafford v. Biggs*, 444 U.S. 527, 535 (1980).

**B. In Interpreting The Extent Of Pre-Emption Of An Expressly Pre-Emptive Federal Statute, The Court Has Recognized That Certain Presumptions Protective Of Federalism Apply.**

Oregon's Petition establishes that the Ninth Circuit's interpretation of §11503(b)(4) is erroneous as a matter of simple construction of the plain meaning of that provision.

Oregon's position is solidified when the presumptions that are protective of federalism which apply in this context are employed. Accordingly, this case should be reviewed to allow for a clear indication from the Court as to the appropriate manner for judicial interpretation of the 4-R Act's scope of express pre-emption of state taxation.

For seven Justices of the Court, concerns of federalism require expressly pre-emptive federal legislation to be interpreted using a fair reading of Congress' intent reflected in the statutory language in light of the presumption against pre-emption. *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4707 (U.S. June 24, 1992), *rev'g. in part, aff'g. in part, and rem'g.*, 893 F. 2d 541 (3rd Cir. 1990). Although *Cipollone* dealt with the pre-emption of state "police powers," a State's taxing power is certainly as fundamental to the preservation of state sovereignty. Moreover, expressly pre-emptive statutory language is also interpreted narrowly in the absence of contraindications in the language of the statute being construed. *Cipollone*, 60 U.S.L.W. at 4707; 60 U.S.L.W. at 4711 (Blackmun, J., concurring in part, and dissenting in part). Consequently, the presumption against pre-emption and the required narrow reading of expressly pre-emptive federal legislation provides an interpretative rule for expressly pre-emptive federal legislation.

In addition, the presumption against pre-emption, as well as the requirement to narrowly read expressly pre-emptive federal legislation, recognizes the sensitivity for the important "Federal-State balance" reflected in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991). A presumption opposed to pre-emption and a narrow construction of expressly pre-

emptive federal legislation, in the absence of a contraindication in the statutory language, simply asks Congress to perform its constitutional role by speaking plainly in its legislation. As a result, the presumption against pre-emption and narrow construction of expressly pre-emptive statutes requires a court to be "certain of Congress' intent before finding that federal law overrides" the Federal-State balance. *Gregory*, 111 S.Ct. at 2401 (citation omitted).

Recognition of the principles of *Cipollone* and *Gregory* and their application in this case and state taxation in general does not in any way diminish congressional power. Congress can always provide for a contrary rule of construction with regard to any expressly pre-emptive legislation it passes.<sup>3</sup> Such a recognition ensures that Congress remains the principal determinant of important federal-state boundaries and that the courts do not extend pre-emption beyond that which is expressly intended by Congress. Any other approach shifts the guarantee of federalism from the political process to the *ad hoc* adversarial contentions of litigants of varying skills, resources of time and assets, and litigation strategy adopted to win the case.

The principles announced in *Cipollone* and *Gregory* are of paramount importance to state taxation today. Taxpayers increasingly seek court expansion of expressly pre-emptive federal laws or court insertion of a missing congressional intent to the law. The lower courts are also failing to

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<sup>3</sup>For example, Congress could adopt as part of any piece of expressly pre-emptive federal legislation a policy statement setting forth the extent of pre-emption over state action intended by Congress.

consider the principles of federalism and the Court's existing jurisprudence with respect to expressly pre-emptive federal statutes.<sup>4</sup>

From the experience of your *Amicus*, the strategy of those seeking federal pre-emption of state taxation appears to be designed to secure any declaration of a pre-emptive intent from Congress and then to argue about its meaning subsequently in court. This practice derogates Congress' constitutional power to draw the boundary lines affecting federalism. The result of the strategy is that States and their citizens are potentially impacted in ways never actually

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<sup>4</sup>See, e.g., *Airborne Freight Corp. v. New York State Dep't. of Taxation and Finance*, 137 A.D. 2d 30, 527 N.Y.S. 2d 107 (App. Div., 3d Dept., 1988) (pre-emption of air transportation carrier franchise tax based on apportioned gross receipts tax as an "indirect" prohibited tax under 49 U.S.C. §1513(a) (1988)); *Davenport Bank and Trust Co. v. Dep't. of Revenue and Finance*, 457 N.W. 2d 610 (Iowa 1990) (pre-emption of state income taxation of interest income on Puerto Rican bonds by extending the federal income tax exemption under 48 U.S.C. §745 (1988) to state taxation); *Morgan Guaranty Trust Co. of New York v. Tax Appeals Tribunal*, No. 61 (N.Y. June 9, 1992) (available at 1992 N.Y. Lexis 1595) (state taxation of the gain on a transfer of real property held by a qualified employee benefit plan held pre-empted by 29 U.S.C. §1144 (1988) (ERISA)); *Dime Savings Bank v. New York*, No. 90-04148 (App. Div., 2d Dept., Jan. 15, 1992) (state mortgage recording fee law held pre-empted by a Federal Home Loan Bank Board regulation, 12 C.F.R. §545.32(b)(5)); and *William Wrigley, Jr., Co. v. Dep't. of Revenue*, 160 Wis. 2d 53, 465 N.W. 2d 800 (1991), *rev'd.*, 60 U.S.L.W. 4622 (U.S. June 19, 1992) (state supreme court held 15 U.S.C. §381 (1988) as requiring a broad construction).



intended by Congress.<sup>5</sup>

The history of litigation under §11503(b)(4) illustrates the manner in which an ambiguous and general provision of a federal statute has been expansively interpreted by courts to the substantial detriment of the States and their citizens. These unjustified interpretations have in effect rendered other specific portions of the 4-R Act meaningless. The 4-R Act litigation is remarkable for the failure of the federal courts to apply the plain meaning rule of statutory construction as supplemented by the principles established by the Court for interpreting expressly pre-emptive congressional legislation. Beginning with *Ogilvie v. State Bd. of Equalization*, 657 F. 2d 204 (8th Cir. 1981), cert. denied, 454 U.S. 1086 (1981), for instance, rather than first analyzing the statutory language of §11503(b) to determine its plain meaning or in light of the presumption against pre-emption and in favor of narrow construction of expressly pre-emptive federal statutes, the Eighth Circuit reviewed the legislative history of the 4-R Act and concluded that §11503(b)(4) should be interpreted broadly because the 4-R Act's "purpose was to prevent tax discrimination against railroads in any form whatsoever." 657 F. 2d at 210. Although legislative history may be useful under particular circumstances, this Court has established

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<sup>5</sup>See 2 STATE TAX NOTES 147 (August 3, 1992), reporting on H.R. 4613, 102d Cong., 2d Sess. (1992) which would require Congress to contemplate the pre-emptive effect of pre-emptive legislation that is proposed. Rep. Thomas, the sponsor, has introduced this bill, among other things, because of Congress' fails to consider fully the impact of its expressly pre-emptive legislation on the States. Identical companion legislation has been introduced in the Senate. S. 2080, 102d Cong., 2d Sess. (1992).

there is no need to look beyond the plain language of an expressly pre-emptive federal statute if it is capable of a plain meaning. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983). Other federal courts have adopted the erroneous interpretative stance first employed by the Eighth Circuit in *Ogilvie*. See *Trailer Train Co. v. State Bd. of Equalization*, 710 F. 2d 468 (8th Cir. 1983); *Burlington Northern R.R. Co. v. Bair*, 766 F. 2d 1222 (8th Cir. 1985); *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415 (8th Cir. 1988), cert. denied sub nom., *Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989); and *Florida Dep't. of Revenue v. Trailer Train Co.*, 830 F. 2d 1567 (11th Cir. 1987). But see, *Trailer Train Co. v. State Bd. of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982). Obviously, this analysis is contrary to this Court's analysis employed in *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 461 (1987) (legislative history of the 4-R Act is "inconclusive and irrelevant."), and is not consistent with the principles of *Cipollone* and *Gregory*.<sup>6</sup>

Accordingly, this Court should accept review of this case in order to guide the federal courts in interpreting the language contained in §11503(b) and (b)(4) in light of the Court's existing jurisprudence. If this Court refuses to accept

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<sup>6</sup>A case pending on protest before the Iowa State Department of Revenue and Finance represents the extreme nature in which §11504(b)(4) is being interpreted by taxpayers. In the *Matter of Burlington Northern R.R. Co.*, No. 91-24-1-0373, the taxpayer is contending that §11503(b)(4) prohibits a State from requiring a special rule of apportionment applicable to railroads for corporate income tax purposes. Therefore, §11504(b)(4) is now being used to challenge a state income tax law even though the federal statute is concerned with property taxation.



certiorari, then the Commission is concerned that the federal courts will continue to surmise the intent of Congress in an unwarranted manner, resulting in the undermining of state sovereignty.

II. THE NINTH CIRCUIT'S DECISION WILL RENDER SUBSTANTIAL HARDSHIP ON THE STATES AND THEIR CITIZENS AND REPRESENTS THE CONTINUING EVISCERATION OF STATE PROPERTY TAX SYSTEMS CAUSED BY EXPANSIVE INTERPRETATIONS OF THE 4-R ACT.

A. The Ninth Circuit's Decision Is An Example Of How Expansive Interpretation Of The 4-R Act Is Causing Economic Dislocation For The States And Hardship For Their Citizens.

Litigation under the 4-R Act provides the most extreme example of how well-resourced taxpayers have promoted an expansive interpretation of an expressly preemptive federal statute to undermine the valid exercise of state sovereignty. As previously noted above, expansive federal court interpretations of Congress' intent, in the absence of a plainly stated intent to that effect, violate existing jurisprudence of the Court and reflect no concern for federalism. In this portion of the argument, we also show the substantial fiscal impact these decisions have had on the States, local governments, and their citizens.

*Amici*, State of Washington, *et al.*, have fully developed the fiscal impact which the Ninth Circuit's

decision portends for those States. The Commission has also collected data as part of its Multistate Property Tax Project demonstrating the substantial fiscal impact on the States as a result of litigation under the 4-R Act. See Appendix A. This data establishes that since 1979, when the 4-R Act went into effect, the total fiscal impact on the States and their political subdivisions caused by the 4-R Act which applies to a *single industry* has been \$607 million. Even if this figure is adjusted to account for tax settlements between States and railroads/carlines and changes in state tax law made as a result of the 4-R Act, the States and their political subdivisions have still been impacted in this *single industry* in the amount of \$433 million in foregone property tax revenue. See Appendix A. Moreover, an additional \$367 million of property tax revenue has been enjoined. See Appendix A.

Additional preliminary data collected by the Commission suggests how the forced tax exemption of railroads and their affiliated industries caused by the invalid rationale of the Ninth Circuit's decision will further impact the States and their citizens should the decision be extended outside of Oregon: Fundamental sources of revenue that state ad valorem personal property tax systems represent will be lost at the expense of other citizens of the States who will see funding for essential state services and benefits seriously eroded. Twenty-nine States responded to a recent Commission survey designed to study the potential fiscal impact of the Ninth Circuit's decision on the States. Of those States responding, twenty-three provided estimates of the amount of ad valorem personal property taxes paid in 1990 by railroads and carline companies, in the aggregate. More

than \$403 million in ad valorem personal property taxes were estimated by these States to have been paid by railroads and carlines companies in 1990. See Appendix B. The existence of personal property tax exemptions available in many of these States (as well as other States which did not respond to the Commission's survey, see Brief of *Amici*, State of Washington, *et al.*, App.-A) indicates that the Ninth Circuit's decision may cause a complete disruption of state ad valorem personal property tax systems. See Appendix C.

The data which the Commission has collected does not indicate how the potential retroactive effect of the Ninth Circuit's decision will impact the States. To the extent the Ninth Circuit's decision is held to apply retroactively, it is certain the fiscal impact on the States and their political subdivisions and the shifting of tax burdens to other citizens will magnify the impacts set forth in Appendices A and B several times over.<sup>7</sup>

This fiscal impact will not be limited solely to state governments. In order to replace lost sources of substantial

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<sup>7</sup>For example, in *Chicago Freight Co. v. Limbach*, 62 Ohio St. 3d 489, 584 N.E. 2d 690 (1992), the Ohio Supreme Court applied *General American Transportation Corp. v. Limbach*, No. C-2-85-1603 (S.D. Ohio, Dec. 29, 1987), retroactively. *General American* had held Ohio's "carline" tax violated §11503(b)(3) and (4) and *Chicago Freight* was entitled to recover carline taxes it had paid for the tax years 1983 through 1987. Similarly, the Nebraska Supreme Court held in *Dairyland Power Coop. v. State Bd. of Equalization*, 238 Neb. 696, 472 N.W. 2d 363 (1991), that taxpayers which had paid Nebraska's "car company" personal property tax were entitled to refunds of taxes paid in 1986 as a result of the Eighth Circuit's decision in *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415 (8th Cir. 1988), *supra*.

amounts of revenue traditionally used to fund public services and benefits which benefit not only the citizens of the States but the global competitiveness of the country, tax burdens will be shifted onto captive taxpayers and citizens of the States. The shifting of tax burdens, however, may pose a serious dilemma for the States: The forced tax exemption of railroad and carline company taxpayers has resulted in discrimination claims being lodged by other "centrally assessed" property taxpayers.

#### **B. The Ninth Circuit's Decision And Remedy Potentially Impacts Property Taxation Of Other Centrally Assessed Properties To The Substantial Detriment Of The States And Their Citizens.**

The forced exemption of carline companies resulting from the Ninth Circuit's decision (and the fiscal impact on the States under the 4-R Act in general) will likely impose fiscal impacts on the States in addition to those directly related to the railroad and carline industry. The Ninth Circuit's decision will undoubtedly shift a greater share of the property tax burden onto captive taxpayers and citizens of the States. Such a shifting of tax burdens may also lead to claims of discrimination by other centrally assessed property taxpayers due to "an increasing concentration of the tax burden on a shrinking group of taxpayers." *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization*, 238 Neb. 565, 583, 471 N.W. 2d 734, 745 (1991) ("The enforcement of §306(1)(d) by the federal court's enjoining the collection of taxes, and similar relief granted by this court pursuant to



Neb. Const. art. VIII, §1, has had the effect of making Nebraska's system of taxation increasingly discriminatory as to the remaining taxpayers." 238 Neb. at 582, 471 N.W. 2d at 745).

Other States have seen decisions similar to the Ninth Circuit's result in the exemption of other centrally assessed property taxpayers based on discrimination claims brought under federal and state constitutional and statutory provisions. For example, interstate pipeline companies have successfully brought claims against the State of Nebraska based on the tax uniformity provision of the state constitution following the Eighth Circuit's forced tax exemption of railroads and carline companies emanating from *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415, *supra*. See generally, *Northern Natural Gas Co. v. State Bd. of Equalization*, 232 Neb. 806, 443 N.W. 2d 249 (1989), *cert. denied*, 110 S.Ct. 1131 (1990); and *Natural Gas Pipeline Co. v. State Bd. of Equalization*, 237 Neb. 357, 466 N.W. 2d 461 (1991). As a result of the involuntary personal property tax exemption forced on Nebraska by the Eighth Circuit in *Trailer Train Co. v. Leuenberger*, *supra*, and the personal property tax exemptions ordered by the Nebraska Supreme Court under the tax uniformity clause of the state constitution in *Northern Natural Gas*, the Nebraska Department of Revenue has estimated that the potential revenue loss to the State is \$222.4 million on an annual basis. See *A Property Tax Crisis: Impact of the Recent Nebraska Supreme Court Rulings*, Nebraska Dep't. of Revenue (September 1989).<sup>8</sup> Nebraska's property tax system was thrown into a

<sup>8</sup>See also 45 TAX NOTES 452 (October 23, 1989).

state of turmoil for nearly three years until voters approved of a state constitutional amendment to eliminate the ability of other centrally assessed property taxpayers to "piggyback" on the *Leuenberger* decision.<sup>9</sup> Oregon and Washington are also seeing a similar explosion of litigation brought by non-railroad and carline centrally assessed property taxpayers advancing theories seeking tax exemptions based on those which prevailed in Nebraska. See Petition at 28-29.

Similarly, as noted in the Petition, other pre-emptive federal legislation with respect to motor carriers and airlines is modeled after §11503. See Petition at 28; See also note 7, *supra*. These other pre-emptive federal statutes also describe what state property tax systems "unreasonably burden and discriminate against interstate commerce." The statutes use language substantially similar to that contained in §11503(b)(1), (2), and (3) to describe state property tax practices that are unlawful. See, e.g., 49 U.S.C. §11503a(b) (1988) (motor carriers) and 49 U.S.C. §1513(d) (1988) (air carriers). Neither §11503a(b) nor §1513(d) contains a corollary to §11503(b)(4)'s "any other tax" provision. The absence of a corresponding "any other tax" provision, however, has not prevented air carriers from successfully arguing in state court that exemptions mandated under §11503(b)(4) for railroads and carline companies also require the exemption of air carriers under §1513(d). For instance, in *Northwest Airlines, Inc. v. State*, 358 N.W. 2d 515 (N.D. 1984), the North Dakota

<sup>9</sup>L.R. 219CA (Neb., May 12, 1992). Railroads and carline companies, however, retain their favorable exemption from Nebraska personal property taxation.



Supreme Court held that, because railroads and carline companies had been granted personal property tax exemptions as a result of *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468 (8th Cir. 1983), *supra*, (carline exemption), and *Ogilvie v. State Bd. of Equalization*, 657 F. 2d 204 (8th Cir. 1981), *supra*, (railroad exemption), §1513(d) required that air carriers be granted the same complete exemption from North Dakota's personal property tax. According to the North Dakota Supreme Court, the federal court mandated property tax exemption for railroads and carlines discriminated against air carriers whose property was not similarly exempted.

The invalid rationale of the Ninth Circuit's decision to the extent adopted elsewhere will force Oregon and other States to accept one of two unacceptable extremes: (1) They may have to exempt all railroad and carline company tangible personal property from taxation leaving themselves open to claims of discrimination by other centrally assessed property taxpayers; or (2) they may have to eliminate all existing tax exemptions thereby sacrificing important social and economic policies recognized in limited personal property tax exemptions. Elimination of personal property tax exemptions will also create a significant controversy by shifting an increasing tax burden for public services and benefits onto a limited group of captive taxpayers. Neither response is acceptable to the preservation of our federal form of government.

## CONCLUSION

For the reasons stated above, this Court should grant Oregon's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 6, 1992

## APPENDIX A

Forty States (out of a total of 51, including the District of Columbia) responded to the Commission's Multistate Property Tax Project Survey. The summary of actual fiscal impact on state and local government caused by the 4-R Act from its effective date of February 4, 1979, §2(b), Pub. L. No. 95-473, 92 Stat. 1466 (1978), through March 15, 1992, is set forth below:

Total Dollar Amount of Funds Enjoined Resulting  
From 4-R Act Cases: . . . . . \$367 million

Total Known Dollar Amount of Funds Lost by State  
and Local Governments Due to 4-R Litigation: \$433 million

Total Known Dollar Amount of Funds Lost by State  
and Local Governments Due to Changes Made in Tax  
Law or Practice Because of Anticipated  
4-R Litigation: . . . . . \$47 million

Total Known Dollar Amount of Funds Lost by  
State and Local Governments in Settlements  
of 4-R Act Cases: . . . . . \$127 million

Total Actual 4-R Dollar Loss Figure Through  
March 15, 1992, Due to Funds Lost in  
Litigation, Funds Lost Due to Tax Law or  
Practice Changes, and Funds Lost Due to 4-R  
Case Settlements: . . . . . \$607 million

Total Actual 4-R Dollar Loss Figure Discounting  
Funds Lost Due to Tax Law or Practice Changes  
and Funds Lost Due to 4-R Case Settlements: \$433 million

The figures reported are cumulative and are based on data reported to the Commission by States responding to the Multistate Property Tax Project Survey. There may be numerous additional 4-R Act cases for which information is not available.

## APPENDIX B

Based on preliminary data derived from a survey by the Commission designed to study the potential fiscal impact of the Ninth Circuit's decision if it is extended to other States, twenty-three (23) States supplied information on the estimated ad valorem personal property taxes paid by railroads and carline companies, in the aggregate, to each responding State for the tax year 1990. The following is a state-by-state listing of the dollar amount of ad valorem personal property taxes as reported to the Commission.

Alabama . . . . .	6,400,000
Arizona . . . . .	6,594,994
Arkansas . . . . .	3,000,000
California . . . . .	2,500,000
Connecticut . . . . .	7,000,000
Florida . . . . .	13,390,914
Georgia . . . . .	10,600,000
Illinois . . . . .	241,996,784
Iowa . . . . .	6,900,000
Kansas . . . . .	14,436,031
Kentucky . . . . .	2,000,000
Nebraska . . . . .	15,300,000
North Carolina . . . . .	4,000,000
North Dakota . . . . .	2,970,547
Maryland . . . . .	5,000,000
Missouri . . . . .	11,400,000
Montana . . . . .	14,000,000
New Jersey . . . . .	2,163,800



North Dakota . . . . .	2,970,547
Utah . . . . .	6,900,000
West Virginia . . . . .	8,697,932
Wisconsin . . . . .	7,600,000
<u>Wyoming</u> . . . . .	<u>7,381,828</u>
Total . . . . .	403,203,277

A total of twenty-nine (29) States responded to the Commission's survey. Six States could not provide an estimate on the aggregate amount of ad valorem personal property taxes paid by railroads and carline companies for the tax year 1990. These States were: Delaware, Idaho, Maine, New York, Rhode Island, and Texas.

## APPENDIX C

Several States which responded to the Commission's survey provide personal property tax exemptions for business inventories and agricultural property such as equipment, livestock, and produce. See also Brief of *Amici*, State of Washington, *et al.*, App. A, for personal property tax exemptions of those States joining as *amici* in that brief.

### BUSINESS INVENTORIES EXEMPTIONS

In response to the Commission's survey, Alabama, Connecticut, Georgia, Kansas, Maine, Maryland, Missouri, and Utah indicated they provide an exemption from ad valorem personal property tax for business inventories.

ALA. CODE §40-9-1(23) (1991)

CONN. GEN. STAT. ANN. §12-81(5), (54) (West 1983)

GA. CODE ANN. §48-5-48.1 (Supp. 1992)

KAN. STAT. ANN. §79-201m (Supp. 1991)

ME. REV. STAT. ANN. tit. 36, §655.1.A., B. (West 1990)

MD. TAX & REV. CODE ANN. §7-222 (1986)

MO. CONST. art X, §6.1

UTAH CODE ANN. §59-2-1114 (1992)

### AGRICULTURAL EQUIPMENT/OTHER AGRICULTURAL PROPERTY EXEMPTIONS

In response to the Commission's survey, Alabama, Connecticut, Georgia, Kansas, Maine, Maryland, and Utah

indicated they provide an exemption from ad valorem personal property tax for agricultural equipment and other agricultural property such as feed, produce, or livestock.

ALA. CODE §40-9-1(9) and (22) (1991)

CONN. GEN. STAT. ANN. §12-81(38)-(39), (40)-(41), and §12-91 (West 1983)

GA. CODE ANN. §48-5-41(a)(10) (1991)

KAN. STAT. ANN. §79-201d and §79-201i, j (1989)

ME. REV. STAT. ANN. tit. 36, §655.1.C., D., M. (West 1990)

MD. TAX & REV. CODE ANN. §7-219 and §7-222 (1986)

UTAH CODE ANN. §59-2-1112 (1992)

**MOTION FILED**  
**AUG 20 1992**

No. 92-74

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**In The**  
**SUPREME COURT OF THE UNITED STATES**  
**October Term, 1992**

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DEPARTMENT OF REVENUE OF THE STATE OF  
OREGON, RICHARD A. MUNN,  
in his capacity as Director of the Department  
of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL  
ELECTRIC RAILCAR SERVICES CORPORATION;  
PULLMAN LEASING COMPANY; RAILBOX COMPANY;  
RAILGON COMPANY; TRAILER TRAIN COMPANY;  
UNION TANK CAR COMPANY,

Respondents.

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**ON PETITION FOR WRIT OF CERTIORARI TO THE**  
**UNITED STATES COURT OF APPEALS FOR THE**  
**NINTH CIRCUIT**

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**MOTION FOR LEAVE TO FILE AMENDED AMICUS**  
**CURIAE BRIEF IN SUPPORT OF PETITIONER AND**  
**AMENDED BRIEF OF THE MULTISTATE TAX**  
**COMMISSION IN SUPPORT OF PETITIONER'S**  
**WRIT FOR CERTIORARI**

---

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**MOTION FOR LEAVE TO FILE AMENDED AMICUS  
CURIAE BRIEF IN SUPPORT OF PETITIONER**

**TO THE HONORABLE CHIEF JUSTICE AND  
THE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES:**

Pursuant to Rule 37.2, the Multistate Tax Commission (hereinafter, the "Commission") respectfully moves the Court for leave to file the accompanying amended amicus curiae brief in support of Petitioner.<sup>1</sup> The Commission requested the written consent of all parties to the case. Respondents ACF Industries, Inc., General American Transportation Corporation, General Electric Railcar Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company, and Union Tank Car Company refused to grant their consent.

The Commission is the administrative arm of the Multistate Tax Compact (hereinafter, the "Compact"). ALL ST. TAX GUIDE, ¶701 *et seq.* (RIA 1992); ST. TAX GUIDE, ¶351 (CCH 1992). The Commission currently has nineteen full member States and fourteen associate member States.<sup>2</sup> The

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<sup>1</sup>The National Association of Counties also joins in filing the accompanying brief. The National Association of Counties is the only national representative of county government in America. Its missions are to enhance the role of counties in our federal system and to assist county officials in the cost efficient service of the needs of their constituents.

<sup>2</sup>The current full members are the States of Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North

expressly stated purposes of the Commission are to facilitate proper determination of state and local tax liability of multistate taxpayers; to promote uniformity and compatibility in state tax systems; to facilitate taxpayer convenience and compliance in the filing of tax returns and in tax administration; and to avoid duplicative taxation. In addition to fulfilling the Compact's expressly stated purposes, the Commission, among other things, has historically stood guard against unwarranted federal pre-emption of state taxation. This role of the Commission has resulted from its historical roots--the Compact was developed in 1967 in direct response to proposed federal legislation that would have directed how States were required to tax multistate businesses. See, Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N. REV. 1, 1 and 23. The validity of the Compact was recognized by this Court in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452 (1978).

The issues presented in this case are of substantial consequence to the Commission, because they bear directly upon the manner in which the Commission's member and associate member States have implemented their property tax systems in our federal system of government that presupposes States with autonomous taxing authority. The property tax is the primary revenue for the legally and politically required services of local government. Without

Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Alabama, Arizona, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia.

attempting to ascertain Congress' express pre-emptive intent in the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter, the "4-R Act) consistent with the Court's established jurisprudence, the Ninth Circuit's decision has placed state property taxation at risk.

The Commission's role in preventing unwarranted federal pre-emption relevant here takes the form of its Multistate Property Tax Project. This project addresses problems regarding taxation of "centrally assessed" properties that have received or are attempting to receive special congressional protection. The Commission, among other things, has encouraged Congress to amend §306 of the 4-R Act. In furtherance of that objective, the Commission has developed data on the fiscal impact visited on the States as a result of litigation under §306 of the 4-R Act and the unrestricted and expansive judicial interpretations of that section. The Commission views with concern the litigation under the 4-R Act that has expanded federal pre-emption of state taxation of railroads and affiliated industries without any proper consideration of the perspective with which expressly pre-emptive federal legislation should be interpreted under the Court's existing jurisprudence.

The compromise of existing state property tax systems that result from decisions like the case at bar is destructive to state sovereignty because the revenues of property taxes are largely dedicated to supporting fundamental public services and benefits which largely support our national economy and maintain this country's global competitiveness. It is plainly apparent that the hardship imposed by the Ninth Circuit's decision, if extended to other States, will be imposed upon

the States and their citizens at a point in time when they are already suffering from fiscal stress. In the Commission's view, expansive interpretations of federal pre-emptive statutes are contributing to deterioration of state fiscal affairs. The Commission desires to submit its amended *amicus curiae* brief to apprise the Court of these concerns as a backdrop to the Court's determination of review.

WHEREFORE, it is respectfully requested that leave be granted for the Multistate Tax Commission to file the accompanying amended *amicus curiae* brief addressing the issue of why this case should be heard.

Respectfully submitted,

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August 21, 1992

No. 92-74

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**In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1992**

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DEPARTMENT OF REVENUE OF THE STATE OF  
OREGON, RICHARD A. MUNN, in his capacity as Director  
of Revenue of the Department of Revenue of the State of  
Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL ELECTRIC  
RAILCAR SERVICES CORPORATION; PULLMAN  
LEASING COMPANY; RAILBOX COMPANY; RAILGON  
COMPANY; TRAILER TRAIN COMPANY; UNION TANK  
CAR COMPANY,

Respondents.

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**AMENDED BRIEF AS AMICUS CURIAE IN SUPPORT OF  
PETITIONER'S WRIT FOR CERTIORARI**



## QUESTIONS PRESENTED

- (1) Whether a State imposes a discriminatory tax on railroad property, in violation of §306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;
- (2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1992

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DEPARTMENT OF REVENUE OF THE  
STATE OF OREGON, Petitioner,  
v.  
ACF INDUSTRIES, INC., *et al.*, Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

---

AMENDED BRIEF OF THE MULTISTATE TAX  
COMMISSION AS AMICUS CURIAE IN  
SUPPORT OF PETITIONER'S  
WRIT FOR CERTIORARI

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REASON FOR AMENDMENT

In the interest of justice, *Amicus*, Multistate Tax Commission, joined by the National Association of Counties, files this Amended Brief to correct mis-statements of fact appearing on pages 13, 14, and Appendix B of its Brief as



*Amicus Curiae* in Support of Petitioner's Writ for Certiorari filed August 6, 1992. See page 14 and Appendix B, *infra*. These mis-statements of fact were brought to the Commission's attention by counsel for Respondents.

### STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter, the "Commission") is the administrative arm of the Multistate Tax Compact (hereinafter, the "Compact"). ALL ST. TAX GUIDE ¶701 *et seq.* (RIA 1992); ST. TAX GUIDE ¶351 (CCH 1992). Nineteen States, including the District of Columbia, have adopted the Compact and are full member States of the Commission. In addition, fourteen States are associate members. The expressly stated purposes of the Commission are to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. *Id.* The Court recognized the validity of the Compact in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452 (1978).

In addition to fulfilling the Compact's expressly stated purposes, the Commission, among other things, has historically stood guard against unwarranted federal pre-emption of state taxation. This role of the Commission has resulted from its historical roots--the Compact was developed in 1967 in direct response to proposed federal legislation that would have dictated how States were required to tax multistate businesses. See Corrigan, *A Final Review*, 1989

MULTISTATE TAX COMM'N. REV. 1, 1 and 23. In this spirit, the Commission has attempted, but not always successfully,<sup>1</sup> to prevent unwarranted federal pre-emption of state taxation.

One of the Commission's efforts to defend against unwarranted federal pre-emption is its Multistate Property Tax Project which addresses problems regarding taxation of "centrally assessed" properties that have received special congressional protection, particularly railroads and their affiliated industries. Under the auspices of the Multistate Property Tax Project, the Commission, among other things, has encouraged Congress to amend §306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter, the "4-R Act"). In furtherance of that objective, the Commission has developed data on the fiscal impact visited on the States as a result of litigation under §306 of the 4-R Act and the unrestricted and expansive judicial interpretations of that section. The Commission views with concern the litigation under the 4-R Act that has expanded federal pre-emption of state taxation of railroads and affiliated industries without any proper consideration of the perspective with which expressly pre-emptive federal legislation should be interpreted under the Court's existing

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<sup>1</sup>Limited resources hinder the Commission. Congress also often fails to notify the States when it contemplates pre-emptive legislation. For example, 49 U.S.C.A. §1513(f) (West Supp. 1991) was adopted in the waning hours of the 101st Congress without prior public exposure. Section 1513(f) raises innumerable construction issues that seriously impact on state taxation of the air carrier industry. See Mines, *Congress Disrupts State Taxation of Air Carriers Through Passage of 49 U.S.C. §1513(f)*, 1991 MULTISTATE TAX COMM'N. REV. 1.

jurisprudence.

### SUMMARY OF ARGUMENT

The Court should grant the petition for the writ of certiorari because the Ninth Circuit's decision violates this Court's existing jurisprudence that is protective of federalism and, therefore, conflicts with the applicable decisions of this Court. Failure to review this case which would otherwise provide clarity on how the lower courts should determine the express intent of Congress to pre-empt long-standing, state tax practices will encourage other courts to adopt the Ninth Circuit's flawed interpretative stance. It is particularly important that the Court address this issue because taxpayer use of pre-emption arguments to invalidate long-standing, state practices is increasing. Guidance emanating from Our Federalism is needed specifically in this case, because Congress did not state in adopting the 4-R Act that the existence of state property tax exemptions, however neutral or fairly distributed, would constitute a violation of the Act. Leaving the Ninth Circuit's decision unreviewed will cause States and their citizens to suffer substantial hardship.

### ARGUMENT.

- I. THERE IS A NEED FOR THE COURT TO STATE CLEARLY THE APPLICABLE STANDARD FOR DETERMINING THE EXTENT OF PRE-EMPTION BY A FEDERAL STATUTE THAT IS EXPRESSLY PRE-EMPTIVE OF STATE TAXATION, BECAUSE LOWER

COURTS HAVE REPEATEDLY CONSTRUED THE 4-R ACT IN A MANNER THAT CONFLICTS WITH THE COURT'S EXISTING JURISPRUDENCE.

#### A. The Determination Of The Extent Of Pre-Emption By An Expressly Pre-Emptive Federal Statute Is In The First Case A Determination Of The Stated Intent of Congress.

There are several recognized tools for a federal court to employ when interpreting a federal law that impacts on State powers. See Petition and Brief of *Amici*, State of Washington, *et al.* Pre-emption analysis using the Court's existing jurisprudence is one of those tools. The Ninth Circuit's analysis of §11503(b)(4)<sup>2</sup> lacks any sensitivity to the impact of its decision on our federal form of government. The Ninth Circuit's decision factors in no moment of concern for interpreting a federal statute as pre-emptive of a long-standing, state tax practice without the support of a clear congressional intent emanating from express statutory language. Specifically, the decision is devoid of any consideration of the Court's existing jurisprudence that applies to congressional legislation pre-empting fundamental or core state sovereign powers. This erroneous approach resulted in the Ninth Circuit's misinterpretation of

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<sup>2</sup>Because the language of the original §306 was first codified at 49 U.S.C. §26c and was altered slightly when the act went into effect three years later (recodified as 49 U.S.C. §11503 (1988)), the Commission adheres to the convention followed by Oregon in its Petition. See Petition at 3-4, notes 3 and 4.

§11503(b)(4).

Congress (but not the courts) enjoys broad legislative powers under the Commerce Clause even when congressional legislation pre-empts fundamental and core state sovereign powers. Nonetheless, the protection of federalism lies in the political process by which such legislation is adopted. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537-554 (1985), and *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). The requirement for Congress to speak its pre-emptive intent clearly provides a guarantee for the political process protection, and the courts are not empowered by the Constitution to supply a missing intent. *United States v. Bass*, 404 U.S. 336, 349-350 (1971). The determination of Congress' pre-emptive intent is in the first instance a determination of congressional intent as embodied in the legislation. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738-740 (1985).

Oregon and *Amici*, State of Washington, *et al.*, have fully developed why the Ninth Circuit's interpretation given to §11503(b)(4)'s "any other tax" provision fails to square with the congressional intent as reflected from the plain meaning of the language used by Congress in §11503(b)(4) and in §11503(b)(1)-(3). Section 11503(b)(4) simply cannot be construed in the manner of the Ninth Circuit, because its construction of §11503(b)(4) renders the specific provisions of §11503(b)(1)-(3) surplusage. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Moreover, an ambiguous provision of a statute has to be construed in context with other provisions of the same statute and harmonized as a whole. *Stafford v. Biggs*, 444 U.S. 527, 535

(1980).

**B. In Interpreting The Extent Of Pre-Emption Of An Expressly Pre-Emptive Federal Statute, The Court Has Recognized That Certain Presumptions Protective Of Federalism Apply.**

Oregon's Petition establishes that the Ninth Circuit's interpretation of §11503(b)(4) is erroneous as a matter of simple construction of the plain meaning of that provision. Oregon's position is solidified when the presumptions that are protective of federalism which apply in this context are employed. Accordingly, this case should be reviewed to allow for a clear indication from the Court as to the appropriate manner for judicial interpretation of the 4-R Act's scope of express pre-emption of state taxation.

For seven Justices of the Court, concerns of federalism require expressly pre-emptive federal legislation to be interpreted using a fair reading of Congress' intent reflected in the statutory language in light of the presumption against pre-emption. *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4707 (U.S. June 24, 1992), *rev'g. in part, aff'g. in part, and rem'g.*, 893 F. 2d 541 (3rd Cir. 1990). Although *Cipollone* dealt with the pre-emption of state "police powers," a State's taxing power is certainly as fundamental to the preservation of state sovereignty. Moreover, expressly pre-emptive statutory language is also interpreted narrowly in the absence of contraindications in the language of the statute being construed. *Cipollone*, 60 U.S.L.W. at 4707; 60 U.S.L.W. at 4711 (Blackmun, J., concurring in part, and dissenting in



part). Consequently, the presumption against pre-emption and the required narrow reading of expressly pre-emptive federal legislation provides an interpretative rule for expressly pre-emptive federal legislation.

In addition, the presumption against pre-emption, as well as the requirement to narrowly read expressly pre-emptive federal legislation, recognizes the sensitivity for the important "Federal-State balance" reflected in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991). A presumption opposed to pre-emption and a narrow construction of expressly pre-emptive federal legislation, in the absence of a contraindication in the statutory language, simply asks Congress to perform its constitutional role by speaking plainly in its legislation. As a result, the presumption against pre-emption and narrow construction of expressly pre-emptive statutes requires a court to be "certain of Congress' intent before finding that federal law overrides" the Federal-State balance. *Gregory*, 111 S.Ct. at 2401 (citation omitted). Recognition of the principles of *Cipollone* and *Gregory* and their application in this case and state taxation in general does not in any way diminish congressional power. Congress can always provide for a contrary rule of construction with regard to any expressly pre-emptive legislation it passes.<sup>3</sup> Such a recognition ensures that Congress remains the principal determinant of important federal-state boundaries and that the courts do not extend

<sup>3</sup>For example, Congress could adopt as part of any piece of expressly pre-emptive federal legislation a policy statement setting forth the extent of pre-emption over state action intended by Congress.

pre-emption beyond that which is expressly intended by Congress. Any other approach shifts the guarantee of federalism from the political process to the *ad hoc* adversarial contentions of litigants of varying skills, resources of time and assets, and litigation strategy adopted to win the case.

The principles announced in *Cipollone* and *Gregory* are of paramount importance to state taxation today. Taxpayers increasingly seek court expansion of expressly pre-emptive federal laws or court insertion of a missing congressional intent to the law. The lower courts are also failing to consider the principles of federalism and the Court's existing jurisprudence with respect to expressly pre-emptive federal statutes.<sup>4</sup>

From the experience of your *Amicus*, the strategy of

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<sup>4</sup>See, e.g., *Airborne Freight Corp. v. New York State Dep't. of Taxation and Finance*, 137 A.D. 2d 30, 527 N.Y.S. 2d 107 (App. Div., 3d Dept., 1988) (pre-emption of air transportation carrier franchise tax based on apportioned gross receipts tax as an "indirect" prohibited tax under 49 U.S.C. §1513(a) (1988)); *Davenport Bank and Trust Co. v. Dep't. of Revenue and Finance*, 457 N.W. 2d 610 (Iowa 1990) (pre-emption of state income taxation of interest income on Puerto Rican bonds by extending the federal income tax exemption under 48 U.S.C. §745 (1988) to state taxation); *Morgan Guaranty Trust Co. of New York v. Tax Appeals Tribunal*, No. 61 (N.Y. June 9, 1992) (available at 1992 N.Y. Lexis 1595) (state taxation of the gain on a transfer of real property held by a qualified employee benefit plan held pre-empted by 29 U.S.C. §1144 (1988) (ERISA)); *Dime Savings Bank v. New York*, No. 90-04148 (App. Div., 2d Dept., Jan. 15, 1992) (state mortgage recording fee law held pre-empted by a Federal Home Loan Bank Board regulation, 12 C.F.R. §545.32(b)(5)); and *William Wrigley, Jr., Co. v. Dep't. of Revenue*, 160 Wis. 2d 53, 465 N.W. 2d 800 (1991), *rev'd.*, 60 U.S.L.W. 4622 (U.S. June 19, 1992) (state supreme court held 15 U.S.C. §381 (1988) as requiring a broad construction).

those seeking federal pre-emption of state taxation appears to be designed to secure any declaration of a pre-emptive intent from Congress and then to argue about its meaning subsequently in court. This practice derogates Congress' constitutional power to draw the boundary lines affecting federalism. The result of the strategy is that States and their citizens are potentially impacted in ways never actually intended by Congress.<sup>5</sup>

The history of litigation under §11503(b)(4) illustrates the manner in which an ambiguous and general provision of a federal statute has been expansively interpreted by courts to the substantial detriment of the States and their citizens. These unjustified interpretations have in effect rendered other specific portions of the 4-R Act meaningless. The 4-R Act litigation is remarkable for the failure of the federal courts to apply the plain meaning rule of statutory construction as supplemented by the principles established by the Court for interpreting expressly pre-emptive congressional legislation. Beginning with *Ogilvie v. State Bd. of Equalization*, 657 F. 2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981), for instance, rather than first analyzing the statutory language of §11503(b) to determine its plain meaning or in light of the presumption against pre-emption and in favor of narrow

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<sup>5</sup>See 2 STATE TAX NOTES 147 (August 3, 1992), reporting on H.R. 4613, 102d Cong., 2d Sess. (1992) which would require Congress to contemplate the pre-emptive effect of pre-emptive legislation that is proposed. Rep. Thomas, the sponsor, has introduced this bill, among other things, because of Congress' fails to consider fully the impact of its expressly pre-emptive legislation on the States. Identical companion legislation has been introduced in the Senate. S. 2080, 102d Cong., 2d Sess. (1992).

construction of expressly pre-emptive federal statutes, the Eighth Circuit reviewed the legislative history of the 4-R Act and concluded that §11503(b)(4) should be interpreted broadly because the 4-R Act's "purpose was to prevent tax discrimination against railroads in any form whatsoever." 657 F. 2d at 210. Although legislative history may be useful under particular circumstances, this Court has established there is no need to look beyond the plain language of an expressly pre-emptive federal statute if it is capable of a plain meaning. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983). Other federal courts have adopted the erroneous interpretative stance first employed by the Eighth Circuit in *Ogilvie*. See *Trailer Train Co. v. State Bd. of Equalization*, 710 F. 2d 468 (8th Cir. 1983); *Burlington Northern R.R. Co. v. Bair*, 766 F. 2d 1222 (8th Cir. 1985); *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415 (8th Cir. 1988), *cert. denied sub nom.*, *Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989); and *Florida Dep't. of Revenue v. Trailer Train Co.*, 830 F. 2d 1567 (11th Cir. 1987). But see, *Trailer Train Co. v. State Bd. of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982). Obviously, this analysis is contrary to this Court's analysis employed in *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 461 (1987) (legislative history of the 4-R Act is "inconclusive and irrelevant."), and is not consistent with the principles of *Cipollone* and *Gregory*.<sup>6</sup>

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<sup>6</sup>A case pending on protest before the Iowa State Department of Revenue and Finance represents the extreme nature in which §11504(b)(4) is being interpreted by taxpayers. *In the Matter of Burlington Northern R.R. Co.*, No. 91-24-1-0373, the taxpayer is contending that §11503(b)(4) prohibits a State from requiring a special rule of apportionment applicable to railroads for corporate



Accordingly, this Court should accept review of this case in order to guide the federal courts in interpreting the language contained in §11503(b) and (b)(4) in light of the Court's existing jurisprudence. If this Court refuses to accept certiorari, then the Commission is concerned that the federal courts will continue to surmise the intent of Congress in an unwarranted manner, resulting in the undermining of state sovereignty.

II. THE NINTH CIRCUIT'S DECISION WILL RENDER SUBSTANTIAL HARDSHIP ON THE STATES AND THEIR CITIZENS AND REPRESENTS THE CONTINUING EVISCERATION OF STATE PROPERTY TAX SYSTEMS CAUSED BY EXPANSIVE INTERPRETATIONS OF THE 4-R ACT.

A. The Ninth Circuit's Decision Is An Example Of How Expansive Interpretation Of The 4-R Act Is Causing Economic Dislocation For The States And Hardship For Their Citizens.

Litigation under the 4-R Act provides the most extreme example of how well-resourced taxpayers have promoted an expansive interpretation of an expressly preemptive federal statute to undermine the valid exercise of state sovereignty. As previously noted above, expansive federal court interpretations of Congress' intent, in the

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*income tax purposes.* Therefore, §11504(b)(4) is now being used to challenge a state income tax law even though the federal statute is concerned with property taxation.

absence of a plainly stated intent to that effect, violate existing jurisprudence of the Court and reflect no concern for federalism. In this portion of the argument, we also show the substantial fiscal impact these decisions have had on the States, local governments, and their citizens.

*Amici*, State of Washington, *et al.*, have fully developed the fiscal impact which the Ninth Circuit's decision portends for those States. The Commission has also collected data as part of its Multistate Property Tax Project demonstrating the substantial fiscal impact on the States as a result of litigation under the 4-R Act. *See* Appendix A. This data establishes that since 1979, when the 4-R Act went into effect, the total fiscal impact on the States and their political subdivisions caused by the 4-R Act which applies to a *single industry* has been \$607 million. Even if this figure is adjusted to account for tax settlements between States and railroads/carlines and changes in state tax law made as a result of the 4-R Act, the States and their political subdivisions have still been impacted in this *single industry* in the amount of \$433 million in foregone property tax revenue. *See* Appendix A. Moreover, an additional \$367 million of property tax revenue has been enjoined. *See* Appendix A.

Additional preliminary data collected by the Commission suggests how the forced tax exemption of railroads and their affiliated industries caused by the invalid rationale of the Ninth Circuit's decision will further impact the States and their citizens should the decision be extended outside of Oregon: Fundamental sources of revenue that state ad valorem personal property tax systems represent will be lost at the expense of other citizens of the States who will



see funding for essential state services and benefits seriously eroded. Twenty-eight States responded to a recent Commission survey designed to study the potential fiscal impact of the Ninth Circuit's decision on the States. Of those States responding, twenty-two provided estimates of the amount of ad valorem personal and real property taxes paid in 1990 by railroads and carline companies, in the aggregate. More than \$107 million in ad valorem personal and real property taxes were estimated by these States to have been paid by railroads and carline companies in 1990. See Appendix B. The existence of personal property tax exemptions available in many of these States (as well as other States which did not respond to the Commission's survey, see Brief of *Amici*, State of Washington, *et al.*, App.-A) indicates that the Ninth Circuit's decision may cause a complete disruption of state ad valorem personal property tax systems. See Appendix C.

The data which the Commission has collected does not indicate how the potential retroactive effect of the Ninth Circuit's decision will impact the States. To the extent the Ninth Circuit's decision is held to apply retroactively, it is certain the fiscal impact on the States and their political subdivisions and the shifting of tax burdens to other citizens will magnify the impacts set forth in Appendices A and B several times over.<sup>7</sup>

<sup>7</sup>For example, in *Chicago Freight Co. v. Limbach*, 62 Ohio St. 3d 489, 584 N.E. 2d 690 (1992), the Ohio Supreme Court applied *General American Transportation Corp. v. Limbach*, No. C-2-85-1603 (S.D. Ohio, Dec. 29, 1987), retroactively. *General American* had held Ohio's "carline" tax violated §11503(b)(3) and (4) and Chicago Freight was entitled to recover carline taxes it had paid for the tax

This fiscal impact will not be limited solely to state governments. In order to replace lost sources of substantial amounts of revenue traditionally used to fund public services and benefits which benefit not only the citizens of the States but the global competitiveness of the country, tax burdens will be shifted onto captive taxpayers and citizens of the States. The shifting of tax burdens, however, may pose a serious dilemma for the States: The forced tax exemption of railroad and carline company taxpayers has resulted in discrimination claims being lodged by other "centrally assessed" property taxpayers.

#### **B. The Ninth Circuit's Decision And Remedy Potentially Impacts Property Taxation Of Other Centrally Assessed Properties To The Substantial Detriment Of The States And Their Citizens.**

The forced exemption of carline companies resulting from the Ninth Circuit's decision (and the fiscal impact on the States under the 4-R Act in general) will likely impose fiscal impacts on the States in addition to those directly related to the railroad and carline industry. The Ninth Circuit's decision will undoubtedly shift a greater share of the property tax burden onto captive taxpayers and citizens of

years 1983 through 1987. Similarly, the Nebraska Supreme Court held in *Dairyland Power Coop. v. State Bd. of Equalization*, 238 Neb. 696, 472 N.W. 2d 363 (1991), that taxpayers which had paid Nebraska's "car company" personal property tax were entitled to refunds of taxes paid in 1986 as a result of the Eighth Circuit's decision in *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415 (8th Cir. 1988), *supra*.

the States. Such a shifting of tax burdens may also lead to claims of discrimination by other centrally assessed property taxpayers due to "an increasing concentration of the tax burden on a shrinking group of taxpayers." *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization*, 238 Neb. 565, 583, 471 N.W. 2d 734, 745 (1991) ("The enforcement of §306(1)(d) by the federal court's enjoining the collection of taxes, and similar relief granted by this court pursuant to Neb. Const. art. VIII, §1, has had the effect of making Nebraska's system of taxation increasingly discriminatory as to the remaining taxpayers." 238 Neb. at 582, 471 N.W. 2d at 745).

Other States have seen decisions similar to the Ninth Circuit's result in the exemption of other centrally assessed property taxpayers based on discrimination claims brought under federal and state constitutional and statutory provisions. For example, interstate pipeline companies have successfully brought claims against the State of Nebraska based on the tax uniformity provision of the state constitution following the Eighth Circuit's forced tax exemption of railroads and carline companies emanating from *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415, *supra*. See generally, *Northern Natural Gas Co. v. State Bd. of Equalization*, 232 Neb. 806, 443 N.W. 2d 249 (1989), *cert. denied*, 110 S.Ct. 1131 (1990); and *Natural Gas Pipeline Co. v. State Bd. of Equalization*, 237 Neb. 357, 466 N.W. 2d 461 (1991). As a result of the involuntary personal property tax exemption forced on Nebraska by the Eighth Circuit in *Trailer Train Co. v. Leuenberger*, *supra*, and the personal property tax exemptions ordered by the Nebraska Supreme Court under the tax uniformity clause of

the state constitution in *Northern Natural Gas*, the Nebraska Department of Revenue has estimated that the potential revenue loss to the State is \$222.4 million on an annual basis. See *A Property Tax Crisis: Impact of the Recent Nebraska Supreme Court Rulings*, Nebraska Dep't. of Revenue (September 1989).<sup>8</sup> Nebraska's property tax system was thrown into a state of turmoil for nearly three years until voters approved of a state constitutional amendment to eliminate the ability of other centrally assessed property taxpayers to "piggyback" on the *Leuenberger* decision.<sup>9</sup> Oregon and Washington are also seeing a similar explosion of litigation brought by non-railroad and carline centrally assessed property taxpayers advancing theories seeking tax exemptions based on those which prevailed in Nebraska. See Petition at 28-29.

Similarly, as noted in the Petition, other pre-emptive federal legislation with respect to motor carriers and airlines is modeled after §11503. See Petition at 28; See also note 7, *supra*. These other pre-emptive federal statutes also describe what state property tax systems "unreasonably burden and discriminate against interstate commerce." The statutes use language substantially similar to that contained in §11503(b)(1), (2), and (3) to describe state property tax practices that are unlawful. See, e.g., 49 U.S.C. §11503a(b) (1988) (motor carriers) and 49 U.S.C. §1513(d) (1988) (air carriers). Neither §11503a(b) nor §1513(d) contains a corollary

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<sup>8</sup>See also 45 TAX NOTES 452 (October 23, 1989).

<sup>9</sup>L.R. 219CA (Neb., May 12, 1992). Railroads and carline companies, however, retain their favorable exemption from Nebraska personal property taxation.

to §11503(b)(4)'s "any other tax" provision. The absence of a corresponding "any other tax" provision, however, has not prevented air carriers from successfully arguing in state court that exemptions mandated under §11503(b)(4) for railroads and carline companies also require the exemption of air carriers under §1513(d). For instance, in *Northwest Airlines, Inc. v. State*, 358 N.W. 2d 515 (N.D. 1984), the North Dakota Supreme Court held that, because railroads and carline companies had been granted personal property tax exemptions as a result of *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468 (8th Cir. 1983), *supra*, (carline exemption), and *Ogilvie v. State Bd. of Equalization*, 657 F. 2d 204 (8th Cir. 1981), *supra*, (railroad exemption), §1513(d) required that air carriers be granted the same complete exemption from North Dakota's personal property tax. According to the North Dakota Supreme Court, the federal court mandated property tax exemption for railroads and carlines discriminated against air carriers whose property was not similarly exempted.

The invalid rationale of the Ninth Circuit's decision to the extent adopted elsewhere will force Oregon and other States to accept one of two unacceptable extremes: (1) They may have to exempt all railroad and carline company tangible personal property from taxation leaving themselves open to claims of discrimination by other centrally assessed property taxpayers; or (2) they may have to eliminate all existing tax exemptions thereby sacrificing important social and economic policies recognized in limited personal property tax exemptions. Elimination of personal property tax exemptions will also create a significant controversy by shifting an

increasing tax burden for public services and benefits onto a limited group of captive taxpayers. Neither response is acceptable to the preservation of our federal form of government.

## CONCLUSION

For the reasons stated above, this Court should grant Oregon's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 21, 1992



## APPENDIX A

Forty States (out of a total of 51, including the District of Columbia) responded to the Commission's Multistate Property Tax Project Survey. The summary of actual fiscal impact on state and local government caused by the 4-R Act from its effective date of February 4, 1979, §2(b), Pub. L. No. 95-473, 92 Stat. 1466 (1978), through March 15, 1992, is set forth below:

Total Dollar Amount of Funds Enjoined Resulting  
From 4-R Act Cases: . . . . . \$367 million

Total Known Dollar Amount of Funds Lost by State  
and Local Governments Due to 4-R Litigation: \$433 million

Total Known Dollar Amount of Funds Lost by State  
and Local Governments Due to Changes Made in Tax  
Law or Practice Because of Anticipated  
4-R Litigation: . . . . . \$47 million

Total Known Dollar Amount of Funds Lost by  
State and Local Governments in Settlements  
of 4-R Act Cases: . . . . . \$127 million

Total Actual 4-R Dollar Loss Figure Through  
March 15, 1992, Due to Funds Lost in  
Litigation, Funds Lost Due to Tax Law or  
Practice Changes, and Funds Lost Due to 4-R  
Case Settlements: . . . . . \$607 million

Total Actual 4-R Dollar Loss Figure Discounting  
Funds Lost Due to Tax Law or Practice Changes  
and Funds Lost Due to 4-R Case Settlements: \$433 million

The figures reported are cumulative and are based on data reported to the Commission by States responding to the Multistate Property Tax Project Survey. There may be numerous additional 4-R Act cases for which information is not available.

## APPENDIX B

Based on preliminary data derived from a survey by the Commission designed to study the potential fiscal impact of the Ninth Circuit's decision if it is extended to other States, twenty-two (22) States supplied information on the estimated ad valorem personal property taxes paid by railroads and carline companies, in the aggregate, to each responding State for the tax year 1990. The following is a state-by-state listing of the dollar amount of ad valorem personal property taxes as reported to the Commission. Those States designated by an asterisk (\*) represent States whose information provided to the Commission included ad valorem personal and real property tax.

Alabama . . . . .	6,400,000*
Arizona . . . . .	2,021,000
Arkansas . . . . .	750,000
California . . . . .	9,500,000*
Connecticut . . . . .	0
Florida . . . . .	10,588,364
Georgia . . . . .	10,600,000*
Illinois . . . . .	0
Iowa . . . . .	0
Kansas . . . . .	14,436,031*
Kentucky . . . . .	1,300,000
Maryland . . . . .	3,000,000
Missouri . . . . .	4,332,000
Montana . . . . .	14,000,000*
Nebraska . . . . .	2,700,000

New Jersey . . . . .	0
North Carolina . . . . .	4,000,000*
North Dakota . . . . .	0
Utah . . . . .	6,900,000*
West Virginia . . . . .	8,697,932*
Wisconsin . . . . .	518,000
<u>Wyoming</u> . . . . .	<u>7,381,828*</u>
Total . . . . .	107,126,155

A total of twenty-eight (28) States responded to the Commission's survey. Six States could not provide an estimate on the aggregate amount of ad valorem personal and real property taxes paid by railroads and carline companies for the tax year 1990. These States were: Delaware, Idaho, Maine, New York, Rhode Island, and Texas.

## APPENDIX C

Several States which responded to the Commission's survey provide personal property tax exemptions for business inventories and agricultural property such as equipment, livestock, and produce. See also Brief of *Amici*, State of Washington, *et al.*, App. A, for personal property tax exemptions of those States joining as *amici* in that brief.

### BUSINESS INVENTORIES EXEMPTIONS

In response to the Commission's survey, Alabama, Connecticut, Georgia, Kansas, Maine, Maryland, Missouri, and Utah indicated they provide an exemption from ad valorem personal property tax for business inventories.

ALA. CODE §40-9-1(23) (1991)

CONN. GEN. STAT. ANN. §12-81(5), (54) (West 1983)

GA. CODE ANN. §48-5-48.1 (Supp. 1992)

KAN. STAT. ANN. §79-201m (Supp. 1991)

ME. REV. STAT. ANN. tit. 36, §655.1.A., B. (West 1990)

MD. TAX & REV. CODE ANN. §7-222 (1986)

MO. CONST. art X, §6.1

UTAH CODE ANN. §59-2-1114 (1992)



**AGRICULTURAL EQUIPMENT/OTHER  
AGRICULTURAL PROPERTY EXEMPTIONS**

In response to the Commission's survey, Alabama, Connecticut, Georgia, Kansas, Maine, Maryland, and Utah indicated they provide an exemption from ad valorem personal property tax for agricultural equipment and other agricultural property such as feed, produce, or livestock.

ALA. CODE §40-9-1(9) and (22) (1991)

CONN. GEN. STAT. ANN. §12-81(38)-(39), (40)-(41), and §12-91 (West 1983)

GA. CODE ANN. §48-5-41(a)(10) (1991)

KAN. STAT. ANN. §79-201d and §79-201i, j (1989)

ME. REV. STAT. ANN. tit. 36, §655.1.C., D., M. (West 1990)

MD. TAX & REV. CODE ANN. §7-219 and §7-222 (1986)

UTAH CODE ANN. §59-2-1112 (1992)

No. 92-74

Supreme Court, U.S.

FILED

MAY 7 1993

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
and RICHARD A. MUNN, in his capacity as Director of  
the Department of Revenue of the State of Oregon,

*Petitioner,*

v.

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN  
TRANSPORTATION CORPORATION, GENERAL ELECTRIC  
RAILCAR SERVICES CORPORATION, PULLMAN LEASING  
COMPANY, RAILBOX COMPANY, RAILGON COMPANY,  
TRAILER TRAIN COMPANY, and  
UNION TANK CAR COMPANY,

*Respondents.*

On Petition For A Writ of Certiorari  
To the United States Court of Appeals  
For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN  
RESPONSE TO SOLICITOR GENERAL'S BRIEF

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**QUESTION PRESENTED**

Respondents re-state the Question Presented as follows:

Was the Court of Appeals wrong in holding, as have all other Courts of Appeal to have considered the question, that the imposition of a property tax on railroad personal property violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503(b)(4), when significant amounts of other commercial and industrial tangible personal property are not taxed due to statutory exemptions?



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## RESPONSE TO SOLICITOR GENERAL'S BRIEF

The Solicitor General's brief presents no compelling argument that "special and important reasons" exist to grant certiorari in this case under Supreme Court Rule 10. None of the specific enumerated grounds listed in Rule 10 are urged to be present here. The Solicitor General cites no true conflict in the decisions of the circuit courts, but he nevertheless urges that certiorari be granted based on his perception that review is warranted to resolve "conflicting rules that the courts have employed in determining liability for, and relief from, discriminatory state taxation. . ." See Brief, p. 9. The Solicitor General's review of the federal case law, however, does not support his conclusions. There is no discord among the circuits in holdings, results, or analyses in similar cases. The lack of complete accord which the Solicitor General perceives is based entirely on a few isolated portions of opinions dealing with a variety of cases, and is simply illusory.

All of the federal appellate cases which have addressed the exemption discrimination issue presented here, including the case below, involve substantial exemptions of other commercial and industrial tangible personal property. See, e.g., *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981) (total exemption of tangible personal property); *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied sub nom. *Boehm v. Trailer Train Company*, 490 U.S. 1066 (1989) (75% of tangible personal property exempt); *Burlington Northern Railroad Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985) (over 50% of tangible personal property not subject to tax); *Department of Revenue*,

*State of Florida v. Trailer Train Company*, 830 F.2d 1567 (11th Cir. 1987) (business inventories, including agricultural livestock, totally exempt).<sup>1</sup> The court below explicitly followed these cases, and its ruling is consistent with the results in these cases.

The court below correctly concluded, based on stipulated facts, that over 67% of the value of commercial and industrial tangible personal property in the State of Oregon was exempt. See Ninth Circuit's Table at App.-18.<sup>2</sup> Although some of the Ninth Circuit's language may be broader than earlier cases, the facts of this case place it squarely within the holding of the Eighth Circuit in *Leuenberger*, a decision which the Solicitor General appears to embrace as correctly decided. The Solicitor General, however, states that the case below differs from "[p]rior decisions addressing the discriminatory effect of property tax exemptions [which] have involved situations in which an unquestionably large portion of the comparable, non-railroad property in the State was exempt." See Brief, pp. 13-14. The Solicitor General fails to explain why he feels the exemption of 67% of the total value of all commercial and industrial tangible personal prop-

<sup>1</sup> *Department of Revenue v. Trailer Train* was an interlocutory appeal and not a review of factual findings by the district court. The extent of the exemptions of personal property is not revealed in that decision, although the court did note the allegation that the exemption of business inventories resulted in "a significant portion" of the tangible personal property of other commercial and industrial taxpayers being totally exempt from *ad valorem* taxation. See 830 F.2d at 1569-70.

<sup>2</sup> The value of exempt personal property is \$9.7 billion. The value of taxed personal property is \$4.8 billion dollars. Thus, the total value of both exempt and taxed personal property is \$14.5 billion, of which \$9.7 billion (or 67%) is exempt.

erty here is materially different from the exemption of 75% of such property in *Leuenberger*.

The Solicitor General is simply incorrect when he states that analyses in the case precedent dealing with exemption discrimination under 49 U.S.C. §11503(b)(4)<sup>3</sup> are "inconsistent." All the circuits that have addressed the exemption issue have determined that discrimination results from the continued taxation of railroad personal property when substantial amounts<sup>4</sup> of other commercial and industrial personal property are exempt. The circuits themselves neither perceive nor cite any conflict. The Solicitor General has been as unsuccessful as the petitioners and *amici* in citing to this Court evidence that any circuit court requires guidance because of differing analyses employed among the circuit courts in the precise kind of case presented here.<sup>5</sup> Indeed, there is no ruling by

<sup>3</sup> As the Solicitor General's brief points out at note 2, the statute involved here, Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 24-210, 90 Stat. 31, 54 (Feb. 5, 1976), is presently codified at 49 U.S.C. §11503. As did the Solicitor General, this brief will cite the subsections of Section 306 in their codified version.

<sup>4</sup> The Solicitor General understates the situation in Oregon when he repeats throughout his brief that Oregon exempts merely "various types" of commercial and industrial property. Oregon exempts all business inventories and all agricultural personalty, which results in the exemption of 67% of all commercial and industrial tangible personal property.

<sup>5</sup> Seeing inconsistency where none exists, the Solicitor General incorrectly states that the "reasoning" of the Eleventh Circuit has been "specifically rejected" by the Eighth Circuit in *Trailer Train Company v. State Tax Commission*, 929 F.2d 1300 (8th Cir.), *cert. denied*, 112 S.Ct 169 (1991). See Brief, p. 12. In fact, the Eighth Circuit does not cite any Eleventh Circuit precedent



any court to support the Solicitor General's bare assertion that "a tax scheme that would be proscribed in one circuit may be sustained in another." See Brief, p. 9. Such conflict has yet to develop because all of the statutory schemes tested to date have involved the same substantial exemption of other commercial and industrial tangible personal property which is present in Oregon, and the circuit courts have consistently found discrimination in such circumstances.

In urging that conflicting analyses exist on both the determination of the existence of discrimination and the remedy for discrimination, the Solicitor General heavily relies on language in cases which do not address claims of exemption discrimination such as presented here.<sup>6</sup> Moreover, he does not rely on the actual holdings of those cases—all of which remedied a discriminatory tax. Instead he seizes upon isolated passages and discussions from the opinions in those cases to conclude that conflicting analyses have been applied. To intimate that these cases create conflict with *Ogilvie*, *Leuenberger*, *Bair*, *Department of Revenue v. Trailer Train*, and the court below in any true sense is simply incorrect.<sup>7</sup> The circuits them-

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in that decision, much less "specifically reject" it. *Trailer Train v. State Tax Commission* did not address exemption discrimination.

<sup>6</sup> See, e.g., *Clinchfield Railroad Company v. Lynch*, 700 F.2d 126 (4th Cir. 1983); *Kansas City Southern Railway Company v. McNamara*, 817 F.2d 368 (5th Cir. 1987); *Burlington Northern Railroad Company v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991); *Trailer Train v. State Tax Commission*, *supra*.

<sup>7</sup> *Clinchfield* was an assessment ratio case decided under Subsection (b)(1). *Trailer Train v. State Tax Commissioner, McNamara*, and *City of Superior* relied on Subsection (b)(4), but

selves do not cite any other circuits as being in conflict with their decisions concerning exemption discrimination.

The Solicitor General cites the decision of the Eleventh Circuit in *Department of Revenue v. Trailer Train Company* as a major example of the alleged "conflicting analyses." He suggests that the Eleventh Circuit has required that the entire tax structure of a state be examined in determining whether exemption discrimination exists, and that the trial court should inquire whether there is any "reasonable distinction" for different tax burdens on different types of property. Although such a discussion does appear in that case, it does not reflect the holding in the case. The Eleventh Circuit merely affirmed the district court's granting of partial summary judgment which held that, in determining whether discrimination exists under Subsection (b)(4), exemptions must be considered. In its remand instructions, the court directed the district court to *consider* whether it would be appropriate to examine the entire tax structure. The Eleventh Circuit never held that such a comparison was appropriate or necessary, and no court, either district or circuit, has ever held that it is necessary to analyze the state's entire tax structure in determining whether tax differences are "reasonable" and thus non-discriminatory under Subsection (b)(4).<sup>8</sup>

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those cases did not involve exemption discrimination, and in fact addressed non-property taxes.

<sup>8</sup> In *Alabama Great Southern Railway Company v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981), the Eleventh Circuit in a remand order had suggested that the district court might find it necessary to review the entire tax structure of the state. In fact, the district court did not do so on remand, finding that it would

Reliance on such dicta shows that the supposedly conflicting analyses seen by the Solicitor General consist of nothing more than differences in the expression of rationales for results in different kinds of cases arising from a wide variety of situations. In urging such "inconsistency" as grounds for certiorari, the Solicitor General sets before this Court the daunting task of not only maintaining consistency of outcome among the circuit courts, but also of complete consistency of analysis, and perhaps even complete consistency of mere expression in differing cases.

The Solicitor General's view would have this Court accept review of this case in order to summarily synthesize a single, all-encompassing "test" for discrimination under Subsection (b)(4). However, he seeks this "guidance" before the decisions of the appellate courts demonstrate, by inconsistency of results, the need for any such guidance. In effect, the Solicitor General seeks an "advisory" opinion from this Court, which is unnecessary in view of the unanimity of opinion by the federal appellate courts concerning both the kind of exemption discrimination presented here, as well as other kinds of discrimination cases.

This Court should instead allow the circuit courts to decide discrimination cases based on the specific facts in each case as they arise. If in fact the Solicitor General is correct, and the courts are applying dif-

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be inappropriate to use the entire tax structure to determine the issue of discrimination. See *Alabama Great Southern Railway Company v. Eagerton*, 541 F.Supp. 1084 (M.D. Ala. 1982). In *Department of Revenue v. Trailer Train*, the Eleventh Circuit did not express any disagreement with the district court's finding on remand in *Eagerton* that a comparison of railroad taxes to the entire tax structure was inappropriate.

ferent standards, such inconsistency will result soon enough in specific conflicts. In fact, there are at least two cases pending in the circuits dealing with exemption discrimination.<sup>9</sup> At a future time, it might be proper for this Court to review one of those decisions to resolve any conflict, should one arise.

It would be particularly inappropriate for this Court to grant certiorari concerning the question of remedy, which the Solicitor General's brief admits is "fact-specific." See Brief, p. 9. To date, the remedies imposed by the appellate courts have been consistent. Where the discrimination has resulted from the fact that most or all other commercial and industrial personal property is exempt, the courts have correctly held that the plaintiffs should not pay tax on their rail transportation personal property. It should be remembered that such rulings do not preclude the imposition of non-discriminatory taxes on rail transportation. As the Fifth Circuit observed in *McNamara*:

If state authorities approach the problem carefully, we trust that they can create tax structures that comply with the 4-R Act while ensuring that railroads pay their fair share of state taxes. We will not do that job for them.

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<sup>9</sup> In *Burlington Northern Railroad Company v. Dept. of Revenue of the State of Washington*, Nos. 92-36774 and 92-36875, the Washington Department of Revenue is arguing to the Ninth Circuit that the case presently under consideration by this Court was wrongly decided and should be re-considered. In *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, No. 92-6100, the Sixth Circuit will for the first time rule on exemption discrimination.



See 817 F.2d at 378.

The Solicitor General suggests that the Eighth Circuit's decision in *Leuenberger* was inconsistent with its earlier decision in *Bair*. This suggestion is incorrect and is based on an erroneous reading of *Bair*. In both cases, the Eighth Circuit afforded to the plaintiffs the same tax treatment which most other commercial and industrial taxpayers received. In *Bair*, that treatment was the ability to claim valuation reductions and tax credits, as could most other commercial and industrial taxpayers in Iowa. In *Leuenberger*, that treatment was complete exemption because most other commercial and industrial taxpayers in Nebraska received a complete exemption. *Bair* was thus distinguished in the Eighth Circuit's later decision in *Leuenberger*,<sup>10</sup> and the remedy approved by the Eighth Circuit in *Bair* has not created conflict within the Eighth Circuit or any other circuit.

Finally, the Solicitor General cites the prediction of the *amici* that dire financial losses may result to the states because of the lower court's decision. These predictions are both exaggerated and irrelevant, and these losses have yet to materialize.<sup>11</sup> In any event,

<sup>10</sup> The court in *Leuenberger* was thoroughly aware of its own prior holding in *Bair*. Indeed, Judge William C. Stuart, the district judge whose remedy was affirmed in *Bair*, also wrote the Eighth Circuit's decision in *Leuenberger*.

<sup>11</sup> The Solicitor General is careful to rely not on his own research, but rather on the *amicus* brief of the MultiState Tax Commission concerning estimates of loss to the states because of a proscription of exemption discrimination. See Brief, p. 16. The rhetoric of the MultiState's brief reveals a general hostility toward congressional exercise of power under the Commerce Clause to restrain discriminatory taxation of instrumentalities of

the provisions of 49 U.S.C. §11503 were enacted in 1976 and Congress gave the states three years to bring their statutes and practices concerning the taxation of railroad property into compliance with federal law before the statute became effective. Since 1979, another fourteen years have elapsed and numerous cases have been decided in favor of the railroads. No genuine fiscal hardship to the states has been shown. The case below represents no departure from the case precedent and is true to the purpose of Congress to prohibit discrimination.

#### CONCLUSION

The Courts of Appeal, the respondents, and the Solicitor General all agree that exemption discrimination should and can be remedied under 49 U.S.C. §11503(b)(4). There is no reason for this Court to examine that result unless and until compelling cases of conflict develop.

Respectfully submitted,

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interstate commerce. In any event, of the twenty-two states listed in Appendix B of the MultiState's amended brief, no more than two have been sued in a new case under Subsection (b)(4) for exemption discrimination in the year since the decision below issued.



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OFFICE OF THE CLERK

**In the Supreme Court  
of the United States**

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE  
STATE OF OREGON, RICHARD A. MUNN,  
in his Capacity as Director of the Department  
of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL  
AMERICAN TRANSPORTATION CORPORATION;  
GENERAL ELECTRIC RAILCAR SERVICES  
CORPORATION; PULLMAN LEASING  
COMPANY; RAILBOX COMPANY; RAILGON  
COMPANY; TRAILER TRAIN COMPANY;  
UNION TANK CAR COMPANY,

Respondents.

On Writ of Certiorari to the  
Ninth Circuit Court of Appeals

**JOINT APPENDIX**

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**PETITION FOR CERTIORARI FILED July 7, 1992**  
**CERTIORARI GRANTED May 17, 1993**

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23 pp

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The following opinions have been omitted in printing this appendix because they appear on the following pages of the printed petition for certiorari:

Opinion of the Ninth Circuit Court of Appeals . . . . .	App-1
Opinion of the United States District Court . . . . .	App-21

**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

- Oct. 6, 1988—Verified Complaint for Injunctive and Declaratory Relief.
- Dec 15, 1988—Defendants' Answer.
- Aug. 18, 1989—Stipulation of Facts filed with the United States District Court.
- Jan. 22, 1990—Order and Judgment of the United States District Court.
- Feb. 5, 1990—Plaintiffs' Motion to Amend the Court's Findings of Facts, to Make Additional Findings of Fact, and to Amend Judgment Accordingly under Rule 52(b); and Motion to Alter or Amend Judgment under Rule 59(e).
- Apr. 20, 1990—Opinion and Order of the United States District Court denying motion to alter or amend judgment.
- May 9, 1990—Plaintiffs' Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.
- Oct. 9, 1991—Opinion of the United States Court of Appeals for the Ninth Circuit [withdrawn].
- Oct. 22, 1991—Defendants' Petition for Rehearing.
- Apr. 8, 1992—Opinion of the United States Court of Appeals for the Ninth Circuit.
- July 7, 1992—Defendant's Petition for Writ of Certiorari.
- May 17, 1993—Certiorari granted.



**VERIFIED COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

[List of attorneys omitted in printing]

ACF INDUSTRIES INCORPORATION, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,	)	
	)	
	)	Civil No. 88-1169PA
	)	
	)	VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
	)	(State Ad Valorem Tax Discrimination)
	)	

Plaintiffs,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,	)
	)
	)

Defendants.

I. This is a civil action seeking to restrain and enjoin defendants, and those in active concern and participation with them, from levying or collecting certain ad valorem taxes from plaintiffs ACF Industries, Incorporated; General American Transportation Corporation; General Electric Railcar Services Corpora-

tion; Pullman Leasing Company; Railbox Company; Railgon Company; Trailer Train Company; and Union Tank Car Company, for the 1988 tax year to the extent that such taxes are discriminatory and unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976), now codified as 49 U.S.C. §11503 and referred to therein as "Section 306." Plaintiffs also seek a declaratory judgment pursuant to 28 U.S.C. §2201 that defendants' assessments of plaintiffs' personal property for the 1988 tax year, and the levy and collection of ad valorem taxes based upon such assessments, violate Section 306.

**JURISDICTION**

2. Jurisdiction of this Court is based upon the following grounds:

a. Section 306(2) which confers jurisdiction upon district courts of the United States (notwithstanding 28 U.S.C. §1341 and without regard to amount in controversy or citizenship of the parties) to prevent a state, subsection of a state, or any authority action for a state or subdivision of a state, from levying or collecting ad valorem taxes that result in discriminatory treatment of common carriers by railroad;

b. 28 U.S.C. §1337 (as more fully appears herein, this action arises under an act of Congress regulating commerce); and

c. 28 U.S.C. §1331 [as more fully appears herein, this action arises under the United States Constitution, Article I, §8, cl. 3 (commerce clause) and presents a federal question].

**VENUE**

3. The defendants reside in this district, and the claims arise in this district, and proper venue is in this Court under 28 U.S.C. §139(b).

### PARTIES

4. Plaintiff, ACF Industries Incorporated ("ACF"), is a New Jersey corporation with its principal offices located in the State of Missouri.

5. Plaintiff, General American Transportation Corporation ("TAGC"), is a New York corporation with its principal offices located in the State of Illinois.

6. Plaintiff, General Electric Railcar Services Corporation ("GERSCO"), is a Delaware corporation with its principal offices located in Chicago, Illinois.

7. Plaintiff, Pullman Leasing Company ("Pullman"), is a division of Signal Capital Corporation, a Delaware corporation with its principal offices located in Chicago, Illinois.

8. Plaintiff, Railbox Company ("Railbox"), is a Delaware corporation with its principal offices in Chicago, Illinois.

9. Plaintiff, Railgon Company ("Railgon"), is a Delaware corporation with its principal offices in Chicago, Illinois.

10. Plaintiff, Trailer Train Company, is a Delaware corporation with its principal offices in Chicago, Illinois.

11. Plaintiff, Union Tank Car Company ("Union Tank"), is a Delaware corporation with its principal offices located in the State of Illinois.

12. Common carriers by rail are required by 49 U.S.C. §11121 to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service. Some common carriers do not directly purchase all of the necessary rolling stock, particularly specialty cars such as tank, hopper and refrigerator cars.

13. Plaintiffs furnish railroad cars for use by common carriers by railroad by leasing railroad cars either to shippers or

directly to railroads and are commonly referred to as private carline companies.

14. Private carline rolling stock, which is leased to shippers or common carriers by railroad and which is used by common carriers by railroad, is "transportation property" under Section 306. All of the plaintiffs' property involved in this action is "transportation property" under Section 306.

15. Defendant, the Department of Revenue of the State of Oregon ("DOR"), is an agency of the State of Oregon, and under ORS 306.115 the DOR exercises general supervision and control over the system of property taxation throughout the State of Oregon. The DOR maintains its principal office in Salem, Oregon.

16. Defendant, Richard A. Munn, is the Director of the Department of Revenue of the State of Oregon ("Director"). Under ORS 305.015, the administration of the revenue and tax laws of the State of Oregon are invested in the DOR and the Director. The Director maintains his principal office in Salem, Oregon.

17. The defendants are responsible for the valuation and assessment of taxes on the property of the plaintiffs within the State of Oregon.

### AD VALOREM TAXATION IN OREGON

18. Under ORS 308.250, all tangible personal property in the state, except that which is expressly exempt, shall be subject to taxation and shall be valued at its "true cash value." Such true cash value shall be taken and considered as the taxable value on which the levy shall be made.

19. Under ORS 308.505 *et seq.*, the tangible personal property of each car company owning or operating any railroad cars in the State of Oregon, including the plaintiffs, is valued and

assessed for ad valorem tax purposes by the defendants. The assessed values are apportioned to the various counties within the State of Oregon, and the counties apply a tax levy and collect the taxes.

20. No less than a third of the plaintiffs' 1988 ad valorem taxes are payable on or before November 15, 1988.

21. Under ORS 307.040 *et seq.*, the following types of personal property, among others, are expressly exempt from ad valorem taxes; agricultural machinery and equipment (ORS 307.400); business inventories (ORS 307.400); livestock, poultry, bees, and fur-bearing animals (ORS 307.400); and agricultural products in possession of farms (ORS 307.325).

22. In addition, significant amounts of other commercial and industrial personal property, including nonagricultural machinery and equipment, is in effect exempt from taxation because of underreporting and undervaluation.

#### SECTION 306

23. Section 306 declares that discriminatory state taxation of rail transportation property or state taxation that results in discrimination against a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission constitutes an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce. Section 306, a copy of which is attached, states in part:

It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher

ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

24. Section 306 defines "transportation property" to mean "transportation property, as defined in the regulations of the [Interstate Commerce] Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

25. Section 306 defines "commercial and industrial property" to mean "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use which is subject to a property tax levy."

26. Section 306 was enacted on February 5, 1976, and, by its terms, became effective February 5, 1979. The purpose of delaying the effective date of Section 306 for a period of three years after its enactment was to give states an opportunity to conform their assessment laws and practices to the requirements of Section 306.



### FIRST CAUSE OF ACTION

27. Plaintiffs incorporate herein the allegations made in Paragraphs 1 through 26, above, and further allege as follows.

28. Oregon's property taxation scheme, as described above, exempts most tangible personal property from taxation.

29. In addition, other tangible personal property, while nominally taxable, is not taxed due to underreporting and under-valuation.

30. As a result, approximately 80% of the aggregate value of tangible personal property in Oregon is not taxed.

31. Plaintiffs' tangible personal property is not entitled to the exemption afforded to other commercial and industrial personal property under Oregon law, and will all be taxed for the 1988 tax year at no less than its true market value.

32. Section 306(1)(d) prohibits the imposition of any tax which results in discriminatory treatment of a common carrier by railroad.

33. Tax discrimination against the rail transportation property of car companies, including plaintiffs, results in discriminatory treatment of common carriers by railroad, therefore the imposition of any personal property tax on plaintiffs, when the personal property of other taxpayers in Oregon is not taxed, violates Section 306(1)(d).

### SECOND CAUSE OF ACTION

34. Plaintiffs incorporate herein the allegations made in Paragraphs 1 through 26, above, and allege alternatively as follows.

35. Approximately 80% of the aggregate value of tangible personal property in Oregon is not taxed.

36. All of plaintiffs' tangible personal property is taxed in Oregon on the basis of no less than its true market value.

37. Because 80% of the aggregate value of personal property in Oregon is not taxed, no more than 20% of the value of plaintiffs' personal property should be taxed.

38. Discriminatory taxation such as this against the rail transportation property of car companies, including plaintiffs, results in discriminatory treatment of common carriers by railroad, and therefore violates Section 306(1)(d).

WHEREFORE, plaintiffs request that judgment be entered in their favor and against defendants, and that this Court grant plaintiffs declaratory and injunctive relief providing that:

(a) The assessment of plaintiffs' personal property, and the imposition, levy, or collection of any property taxes against plaintiffs' personal property pursuant to Oregon law violates Section 306(1)(d), and that the imposition, levy, or collection of the tax from plaintiffs be preliminarily and permanently enjoined;

or

(b) The assessment of plaintiffs' personal property, and the imposition, levy, or collection of any property tax based on more than 20% of the value of plaintiffs' personal property violates Section 306(1)(d), and that the imposition, levy, or collection of a tax on more than 20% of the value of plaintiffs' personal property from plaintiffs be preliminarily and permanently enjoined;

(c) That the Court award to plaintiffs their costs and such other and further relief as this Court deems just and proper.

[Names of counsel and signature omitted in printing]

**VERIFICATION**

I, Alan Rusin, do hereby declare that I am the Director of Taxes for GATX Corporation, and I further declare that the facts stated in the foregoing complaint are true to the best of my knowledge and belief.

[Signature and certification omitted in printing]

**STIPULATION OF FACTS**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

[List of attorneys omitted in printing]

ACF INDUSTRIES INCORPO- )  
RATION, GENERAL AMERI- )  
CAN TRANSPORTATION COR- )  
PORATION, GENERAL ELEC- )  
TRIC RAILCAR SERVICES )  
CORPORATION, PULLMAN )  
LEASING COMPANY, RAIL- )  
BOX COMPANY, RAILGON )  
COMPANY, TRAILER TRAIN )  
COMPANY, and UNION TANK )  
CAR COMPANY, )

Plaintiffs,

) Civil No. 88-1169PA

vs.

) STIPULATION OF  
) FACTS

DEPARTMENT OF REVENUE )  
OF THE STATE OF OREGON, )  
and RICHARD A. MUNN, in his )  
capacity as Director of the Depart- )  
ment of Revenue of the State of )  
Oregon, )

Defendants. )

The parties agree that the following facts are true and require no proof:

1. These stipulations are made for the sole purpose of permitting the Court to decide the issues presented in this case. They shall not be binding on any party or considered admissions for any other purpose or in any other action or proceeding.

2. The parties agree and stipulate that the Court may, for purposes of deciding this litigation, accept stipulated facts as true. However, the parties do not waive their right to object to the relevancy of any facts stipulated herein, or to argue as to the relevancy of any of these facts.

#### SECTION 306

3. 49 U.S.C. §11503 was originally enacted as Section 306 of Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("Section 306"), the Railroad Revitalization and Regulatory Reform Act of 1976. 49 U.S.C. §11503 was published as part of Pub. L. No. 95-473, 92 Stat. 1337, which was "an act to revise, codify and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV, Title 49, United States Code transportation." Section 3(a) of Pub. L. No. 95-473, 92 Stat. 1446, also provides that the statutory language of 49 U.S.C. §11503 cannot be construed as making a substantive change to Pub. L. No. 94-210. A copy of Section 306 is attached as Exhibit "A" to the Complaint, and the parties stipulate that the provisions of Section 306 control.

4. Section 306 was enacted on February 5, 1976, but it did not become effective until February of 1979. All taxes involved in this lawsuit were assessed after the effective date of the Act.

#### THE PARTIES

5. Plaintiffs ACF Industries Incorporated, General American Transportation Corporation, General Electric Rail Car Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company, and Union Tank Car Company all furnish railroad cars for use by common carriers by railroad by leasing railroad cars either to shippers or directly to railroads. The plaintiffs are commonly referred to as "private carline companies."

6. The following chart depicts, for each plaintiff, the percentage of its fleet leased to shippers and to railroads:

	<u>Leased to Shippers</u>	<u>Leased to Railroads</u>
ACF	97%	3%
GATX	99%	1%
GERSCO	77%	23%
Pullman	64%	36%
Railbox	0%	100%
Railgon	0%	100%
Trailer Train	.001%	99.999%
Union	99%	1%

7. Common carriers by railroad are required by 49 U.S.C. §11121 to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service. Some common carriers do not directly purchase all of the necessary rolling stock, particularly specialty cars such as tank, hopper, and intermodal cars.

8. The private carline industry provides cars which are used by railroads to provide their transportation service. For example, Union Tank, General American Transportation Corporation, and ACF Industries own 103,741 tank cars which comprise 56% of the nation's tank car fleet. As a result, railroads do not have to expend the capital to acquire or to maintain these cars.

9. Plaintiffs ACF Industries Incorporated, General American Transportation Corporation, General Electric Railcar Services Corporation, Pullman Leasing Company, and Union Tank Car Company are private car companies engaged in the business of leasing railcars to railroads and/or shippers. The rolling stock of these private car companies is used by common carriers by railroad to provide rail transportation services to shippers. Under 49 U.S.C. §11122, the Interstate Commerce Commission (ICC)



is authorized to regulate the lease agreements between these carlines and the shippers. The ICC is also authorized to regulate the tariffs that shippers pay to railroads and that railroads pay to the private car companies.

10. With respect to the carlines referred to in Paragraph 9, the private carline company normally leases railroad cars to a shipper on a periodic basis. The shipper in turn provides the car to the railroad and the railroad is paid a full freight charge for shipping goods using the car. The railroad pays the private carline company for the use of the car, which payment is in turn credited by the private carline company against the shipper's lease obligation.

11. None of the named plaintiffs (other than Trailer Train, Railbox, and Railgon) operates under a formal car pooling arrangement pursuant to 49 U.S.C. §11342. *See*, Exhibit A. pp. 875-877 for a description of a pooling arrangement. Some of the plaintiffs, however, have arrangements with common carriers by railroad under which their cars are used by (and are earmarked for return to) specific common carriers by railroad.

12. Trailer Train was incorporated in Delaware on November 9, 1955. As of January 1, 1988, its stockholders consisted entirely of operating railroads. Trailer Train was organized by the owner-railroads to meet the demand for a nationwide fleet of "piggy back" flatcars. Such flatcars carry truck trailers and are referred to as trailer-on-flatcar (TOFC) cars. Operations began in 1956 with a fleet of 500 cars. Trailer Train now owns both TOFC cars and other kinds of flatcars.

13. Railbox was organized as a wholly-owned subsidiary of Trailer Train on January 3, 1974, in an effort to remedy chronic boxcar shortages through the use of a "Pool" of standard-design, wide-door boxcars of general usefulness. Railbox is a separate

corporate entity from Trainer [*sic*] Train. Railbox made an initial acquisition of 10,000 cars from its own resources and with the assistance of certain railroads.

14. Railgon was organized as a wholly-owned subsidiary of Trailer Train on June 20, 1979, in response to requests from the railroad industry for a pool of new, standardized, heavy-duty, free-running gondola cars. Such cars are used primarily to haul steel products and scrap. Railgon is a separate corporate entity from Trailer Train.

15. In February 1974, Trailer Train and Railbox, along with 28 common carriers by rail, sought approval from the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act for the pooling of car services. On August 1, 1974, the Commission issued an order which approved in the public interest pooling agreements for both boxcars and flatcars for Railbox and Trainer [*sic*] Train, respectively and which allowed a division of service and a division of earnings. The principal purposes of the pooling agreement were: to standardize car types for improved utility and economy; to coordinate research, information and development; to obtain better car management at a lower cost; and to improve rail service to the public. *See, American Railbox Company and Trailer Train Company; et al., For Approval of The Pooling of Car Service With Respect to Boxcars*, 347 ICC 862 (1974), a copy of which is attached as Exhibit A hereto.

16. On July 14, 1987, Trailer Train and all participants in the pooling agreement filed an application with the ICC for an extension of the pooling agreement and Form A car contract. On February 17, 1989, the ICC approved and authorized the extension of the pooling for a period of five years from October 1, 1989.

17. The order of the Interstate Commerce Commission which approved the Trailer Train and Railbox pools indicated that, while both companies would be exempt from most regulations by the Commission, the companies would be subject to emergency car service directives (as are common carriers by railroad), would be required to file all rate changes with the Commission (subject to rejection by the Commission upon complaint or upon its own motion), and would be prevented from paying any dividends or rebates to carrier participants without prior approval of the Commission.

18. A similar pooling agreement, with reference to gondola cars owned by Railgon, was approved by the Commission on March 7, 1980.

19. Under the car contracts by which the cars of Trailer Train, Railbox, and Railgon are provided to common carriers by railroad, all state taxes are paid by the carlines as expenses of operation, and such expenses are passed on to common carriers by railroad by means of the user charges which take into account all expenses, including expenses for state taxes. The basic terms of such contracts are approved by the Interstate Commerce Commission.

20. The essential relationships among Trailer Train, Railbox, Railgon and common carriers by railroad as set forth in Exhibit A have not changed materially since the date of that report.

21. On December 13, 1978, the Interstate Commerce Commission defined "transportation property" for purposes of Section 306 in ICC Document No. 36873 (a copy of which is attached hereto as Exhibit B). The Commission's definition of transportation property specifically includes rail cars held under pooling agreements, or used, but not owned, by railroads.

22. Private carline rolling stock, which is leased to shippers or common carriers by railroad and which is used by common carriers by railroad, is therefore "transportation property" under Section 306. All of the plaintiffs' property involved in this action is "transportation property" under Section 306.

23. Defendant, the Department of Revenue of the State of Oregon (DOR), is an agency of the State of Oregon, and under ORS 306.115, the DOR exercises general supervision and control over the system of property taxation throughout the State of Oregon. The DOR maintains its principal office in Salem, Oregon.

24. Defendant, Richard A. Munn, is the Director of the Department of Revenue of the State of Oregon (Director). Under ORS 305.015, the administration of the revenue and tax laws of the State of Oregon are vested in the DOR and the Director. The Director maintains his principal office in Salem, Oregon.

25. The defendants are responsible for the valuation and assessment of taxes on the property of the plaintiffs within the State of Oregon.

#### PROPERTY TAXATION IN OREGON

26. ORS 308.250 requires all tangible personal property in the State, except that which is expressly exempt, to be subject to taxation and to be valued at its "true cash value." Such true cash value shall be taken and considered as a taxable value on which the levy shall be made.

27. Under ORS 307.040 *et seq.*, the following types of personal property, among others, are expressly exempt from ad valorem taxes: agricultural machinery and equipment (ORS 307.400); business inventories (ORS 307.400); livestock, poultry, bees, and fur-bearing animals (ORS 307.400); and agricultural products in possession of farms (ORS 307.325).

28. In addition the following types of property are not subject to ad valorem taxes because they are subject to registration fees or severance taxes: motor vehicles (ORS 803.585) and standing timber (ORS 321.272, 321.420).

29. Plaintiffs' tangible personal property was assessed and taxed for the 1988 tax year at no less than its true cash value.

30. The total amount of locally appraised personal property which was taxed in Oregon, as of January 1, 1988, was \$3.6 billion.

31. As of January 1, 1988, the estimated market value of centrally-assessed, non-railroad utility personal property which was taxed in Oregon is \$1.2 billion.

32. As of January 1, 1988, the estimated market value of farm machinery and equipment (excluding motor vehicles) and livestock in Oregon which is exempt from tax is \$1.4 billion.

33. As of January 1, 1988, the estimated market value of non-farm business inventory in Oregon which is exempt from tax is \$6.8 billion.

34. As of January 1, 1988, the estimated market value of agricultural, commercial, and industrial motor vehicles is \$1.5 billion.

35. As of January 1, 1988, the estimated market value of non-exempt non-farm business machinery, equipment, and furniture and fixtures (excluding utilities and motor vehicles) is \$8.0 billion.

36. As of January 1, 1988, the estimated market value of all farm and non-farm business tangible personal property (including utilities and motor vehicles) is \$18.9 billion, and \$17.4 billion excluding motor vehicles.

37. As of January 1, 1988, the percentage of commercial and industrial tangible personal property which is not taxed (by

reason of exemption, undervaluation, and underreporting) in Oregon is approximately 75%, if motor vehicles are included.

38. As of January 18, 1988, the percentage of commercial and industrial tangible personal property which is not taxed (by reason of exemption, undervaluation, and underreporting) in Oregon is approximately 72%, exclusive of motor vehicles.

39. For the tax year 1988, the estimated market value of standing timber is \$11.6 billion.

40. For the tax year 1988-89, the total receipts of timber severance taxes collected pursuant to ORS 321.257, 321.405 and 321.005 were \$26.4 million.

41. Defendants published a report which, among other things, indicated an estimated market value in Oregon of \$65.0 billion, for intangible personal property, as of January 1, 1986. The parties have no specific factual information as to what portion of the total intangible personal property is commercial and industrial property.

42. The average *ad valorem* tax rate in Oregon for the 1988 tax year is 2.489%.

43. As of January 1, 1988, an estimated \$4.4 billion in value of non-exempt commercial and industrial tangible personal property was not taxed due to "undervaluation" or "underreporting." The parties estimate that, of the \$4.4 billion, \$2.8 billion is attributable to undervaluation, and \$1.6 billion is due to underreporting.

44. For the tax year 1988-89, the estimated market value of centrally-assessed non-railroad utility real property is \$4.8 billion.

45. For the tax year 1988-89, the estimated market value of locally-assessed commercial and industrial real property (excluding utilities) is \$19.9 billion.



46. For the tax year 1988-89, the estimated market value of commercial and industrial real property (including utilities) is \$24.7 billion.

Dated this 18th day of August, 1989.

[Signatures omitted in printing]

[Exhibits omitted in printing]

**PLAINTIFFS' MOTION TO AMEND  
COURT'S FINDINGS OF FACT**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

[Names of Counsel omitted in printing]

ACF INDUSTRIES INCORPO-	)	
RATION, GENERAL AMERI-	)	
CAN TRANSPORTATION COR-	)	
PORATION, GENERAL ELEC-	)	
TRIC RAILCAR SERVICES	)	
CORPORATION, PULLMAN	)	Civil No. 88-1169PA
LEASING COMPANY, RAIL-	)	
BOX COMPANY, RAILGON	)	PLAINTIFFS' MOTION
COMPANY, TRAILER TRAIN	)	TO AMEND THE
COMPANY, and UNION TANK	)	COURT'S FINDINGS
CAR COMPANY,	)	OF FACTS, TO MAKE
	)	ADDITIONAL FIND-
Plaintiffs,	)	INGS OF FACT, AND
	)	TO AMEND JUDG-
vs.	)	MENT ACCORDINGLY
	)	UNDER RULE 52(b);
DEPARTMENT OF REVENUE	)	AND MOTION TO
OF THE STATE OF OREGON,	)	ALTER OR AMEND
and RICHARD A. MUNN, in his	)	JUDGMENT UNDER
capacity as Director of the Depart-	)	RULE 59(e)
ment of Revenue of the State of	)	
Oregon,	)	
	)	
Defendants.	)	

(Oral Argument Requested)

Pursuant to Rules 52(b) and 59(3) of the Federal Rules of Civil Procedure, the plaintiffs move this Court to amend the Court's findings and conclusions, to make additional findings and conclusions, and to amend judgment accordingly, and to alter and

amend its Order and Opinion filed on January 23, 1990, in the following respects:

1. To modify explicit or implicit findings of the Court which are inconsistent in the following particulars with the Stipulations of Facts which constitutes the record;

(a) The finding that standing timber should be considered as, or compared to, personal property, is contrary to Paragraphs 37 and 38 of the Stipulation. To be consistent with the Stipulation the Court should have found that timber is not properly part of the comparison class in this case;

(b) The finding that timber is subject to an *ad valorem* property tax is contrary to Paragraph 28 of the Stipulation. To be consistent with Stipulation the Court should have found that timber is not subject to *ad valorem* property tax;

(c) the finding that the percentage of personal property which is exempt is no more than 38.2% is contrary to Paragraphs 37 and 38 of the Stipulation. To be consistent with the Stipulation the Court should have found that 67% of personal property in Oregon was exempt;

(d) the finding that the plaintiffs failed to demonstrate that their personal property was valued at full cash value is contrary to Paragraph 29 of the Stipulation. To be consistent with the Stipulation the Court should have found that the plaintiffs' personal property is assessed and taxed "at no less than its true cash value."

2. To correct the Court's statement that the plaintiffs' claim rested on the argument that Oregon's exemption of standing timber from *ad valorem* property tax violates Section 306(1)(d), and to modify the Court's implicit finding that standing timber is part of the comparison class of *personal* property to be consider-

ed in this case, and instead to exclude timber from the comparison class considered.

3. To clarify whether the "comparison class" of personal property under Section 306(1)(d) does or does not include motor vehicles.

4. To grant, based on the foregoing, the relief originally requested by the plaintiffs in their Complaint.

This motion is based on the pleadings, Stipulation of Facts, and Memoranda of Law already on file, and the attached Memorandum of Law.

[Signatures and certification omitted in printing]

# UNITED STATES DISTRICT COURT OPINION

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

[Names of Counsel omitted in printing]

ACF INDUSTRIES INCORPO- )  
RATION, GENERAL AMERI- )  
CAN TRANSPORTATION COR- )  
PORATION, GENERAL-ELEC- )  
TRIC RAILCAR SERVICES )  
CORPORATION, PULLMAN )  
LEASING COMPANY, RAIL- )  
BOX COMPANY, RAILGON )  
COMPANY, TRAILER TRAIN )  
COMPANY, and UNION TANK )  
CAR COMPANY, )

Plaintiffs, )

v. )

DEPARTMENT OF REVENUE )  
OF THE STATE OF OREGON, )  
and RICHARD A. MUNN, in his )  
capacity as Director of the Depart- )  
ment of Revenue of the State of )  
Oregon, )

Defendants. )

PANNER, J.

Plaintiffs (Carlines) brought this action against defendants Oregon Department of Revenue and its Director, Richard Munn (collectively "the Department"). They sought declaratory and injunctive relief against the Department's assessment and collection of Carlines' Oregon personal property taxes for the tax

CV No. 88-1169-PA

OPINION

year 1988, contending that it discriminated against railroads, in violation of §306 [sic] of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

I decided the case based on the briefs and stipulated facts, and counsel's statements at closing argument that they had nothing to add to their briefs. On January 22, 1990, I filed an opinion granting judgment for the Department. Carlines move to amend the findings and to make additional findings under Fed.R.Civ.P. 52(b), and to amend the judgment under Fed.R.Civ.P. 59(e). I deny Carlines' motion.

## DISCUSSION

The background and applicable law are set forth in my opinion of January 22, 1990, and do not warrant repetition. Carlines ask for a number of modifications, reversals and clarifications to my findings and conclusions. Before addressing each in turn, I have four general comments.

First, Carlines motion implies that because the parties agree to facts, that I must agree to inferences drawn from those facts, and how the law applies. I disagree. This case hinges on a determination of how certain agreed numbers should be classified within the meaning of a statute. In their stipulations, the parties made it clear that while they agreed to the calculations of the figures, they did not agree as to the classifications. If the parties agreed to the exact meaning of those classifications and how the law applies to them, there would be no case.

Second, Carlines mischaracterize certain of my findings so seriously that they can hardly claim error or innocence. They contend that I find standing timber to be personal property subject to ad valorem taxation, which directly contradicts the parties' stipulations. On page 4, line 1 of my opinion, I state that standing timber is real property under Oregon law. I find nothing



in my opinion that says standing timber is subject to ad valorem taxation. What I did say is that standing timber if "taxed under an elaborate plan", and that just because it is taxed at harvest, rather than while standing, does not mean it is not taxed. Opinion at 14, lines 15-19.

Third, Carlines frame their motion to reconsider as though I had not understood what they said the first time, or I concluded their position lacked merit. What I did say was they failed to meet their burden of proof to show impermissible discrimination. Perhaps stating it a different way will satisfy Carlines' craving for clarity. I was unpersuaded on the facts or the law that Carlines had shown impermissible discrimination by a preponderance of the evidence. I remain unpersuaded.

Fourth, although framed as specific disputes with my findings and conclusion, Carlines' motion is nothing more than another stab at getting me to adopt their conceptual approach to this case. Again, I do not.

This case requires me to consider two extremes. On one hand, perhaps the ideal world for Carlines, the Department could be prohibited from exempting any personal property from property taxes, (except presumably Carlines'), at the risk of violating the 4R Act. In their world, a state could not structure its tax policy to recognize significant economic and physical differences between types of property. For example, there are differences between business inventories, which are regularly liquidated and can move from state to state, standing timber, which is attached to real property for long periods, during which it produces no cash flow, and becomes personal property when harvested, and railroad cars leased to railroads, which have none of those characteristics.

At the other extreme, perhaps the ideal world for the Department, a state would be completely unfettered in designing its property tax policy, at no risk of violating the 4R Act. In this world, a property tax could be very simple: 1) there is a property tax on all personal property in the state of Oregon, except as specifically exempted; 2) all property is exempted except that owned by railroads (or presumably Carlines.) More significant than the practical absurdity at either extreme, is that the legislative history of §306 [sic] makes it clear that Congress wanted to avoid both and balance the interests of the states and the railroads. For that reason, I see my role as determining whether the Oregon property tax system satisfies the intent of that compromise. It is Carlines' burden to show that it does not. They have not done that.

I turn to Carlines specific requests.

**I. TO REVERSE THE FINDING THAT STANDING TIMBER IS PART OF THE COMPARISON CLASS OF PROPERTY AGAINST WHICH DISCRIMINATION AGAINST CARLINES SHOULD BE MEASURED**

Carlines contend that because the parties stipulated that standing timber is real property, I erred by disregarding the stipulation and using standing timber as part of the class of property against which Carlines' property should be compared.

I disagree. To adopt this argument would be to adopt the approach to deciding the case that Carlines has consistently urged, which I rejected. I did not, and will not now decide precisely what type of property falls into what category because it is unnecessary to do so.

**II. TO REVERSE THE FINDING THAT STANDING TIMBER IS SUBJECT TO AD VALOREM TAXATION**

As explained above, I did not find, either implicitly or explicitly that standing timber is subject to ad valorem taxation.

III. TO MODIFY THE FINDING THAT NO MORE THAN 38.2% OF PERSONAL PROPERTY IS EXEMPT FROM PERSONAL PROPERTY TAXATION RATHER THAN 67%

*See, generally*, my January 22, 1990 opinion.

IV. TO REVERSE THE FINDING THAT CARLINES FAILED TO SHOW ITS PERSONAL PROPERTY WAS VALUED AT FULL CASH VALUE FOR PERSONAL PROPERTY TAXATION PURPOSES

Oregon law requires that all personal property be assessed at its full cash value for personal property taxation purposes. ORS 308.250. "Full cash value" is in contrast to any percent less than 100%. Naturally the parties stipulated that Carlines property was assessed at full cash value — the law so requires. This does not mean that when the assessor values the property, the figure is the actual market value of the property. It means that when the assessor reaches a decision about the full cash value, that value is the figure on which the taxes are calculated.

There is no inconsistency between the stipulation that Carlines' property is assessed at full cash value, and my finding that Carlines had made no showing that any undervaluation discriminates against them or that their property is not undervalued along with everyone else's. *See*, Opinion at 13, n.4. If an assessor assessed every other piece of personal property in Oregon except Carlines' at less than its market value, a case of discriminatory undervaluation might be made. It was not.

V. TO CORRECT THE STATEMENT THAT CARLINES' CLAIM RESTED ON THE ARGUMENT THAT STANDING TIMBER IS EXEMPT FROM AD VALOREM TAXATION

My opinion does say "Carlines' claim rests in large part on the argument that Department violates §306(d) [*sic*] by exempting standing timber from property taxes." Opinion at 13, lines

13-15. I confess to less than complete clarity. I did not mean to suggest that Carlines' expressly made this argument. What I meant to say was that under my view of the case, Carlines could not prevail unless standing timber is viewed as exempt from taxation.

VI. TO CLARIFY WHETHER THE COMPARISON CLASS INCLUDES OR EXCLUDES MOTOR VEHICLES

I did not, and do not now decide whether the comparison class includes or excludes motor vehicles because it is not necessary to do so. *See* Opinion at 13-14.

VII. TO GRANT THE RELIEF CARLINES ORIGINALLY SOUGHT, BASED ON THE FOREGOING MODIFICATIONS, CORRECTIONS AND CLARIFICATIONS

No. *See, generally*, the foregoing.

CONCLUSION

I deny Carlines' motion (#50).

DATED this 20 day of April, 1990.

[Signature omitted in printing]

**OPINION OF THE NINTH CIRCUIT  
COURT OF APPEALS**

[Opinion set forth in full as Appendix A, pages App-1 to App-19 of the printed petition for certiorari]

**OPINION OF THE UNITED STATES  
DISTRICT COURT**

[Opinion set forth in full as Appendix B, pages App-21 to App-33 of the printed petition for certiorari]





### **QUESTIONS PRESENTED**

(1) Whether a State imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE  
STATE OF OREGON, RICHARD A. MUNN,  
in his Capacity as Director of the Department  
of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL  
AMERICAN TRANSPORTATION CORPORATION;  
GENERAL ELECTRIC RAILCAR SERVICES  
CORPORATION, PULLMAN LEASING  
COMPANY; RAILBOX COMPANY; RAILGON  
COMPANY; TRAILER TRAIN COMPANY;  
UNION TANK CAR COMPANY,

Respondents.

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *ACF Industries Inc., et al. v. Dept. of Revenue of the State of Oregon*, 961 F.2d 813 (1992). The district court's opinion is unreported.<sup>1</sup>

<sup>1</sup> The opinions of both the Ninth Circuit and the district court are reproduced in the appendix to the petition for certiorari.

### JURISDICTION

28 U.S.C. § 1254(1) (1982) gives the Court jurisdiction to issue a writ of certiorari to the federal courts of appeals. The court of appeals' judgment was entered on April 8, 1992. A timely petition for certiorari was filed within 90 days. *See* 28 U.S.C. § 2101(c); Supreme Court Rule 13.1.

### STATUTES INVOLVED

49 U.S.C. § 11503, the Railroad Revitalization and Regulatory Reform Act of 1976, provides, in pertinent part:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

"Commercial and industrial property" is defined in 49 U.S.C. § 11503(a)(4) as:

property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax.

### STATEMENT OF THE CASE

1. This case was brought pursuant to 49 U.S.C. § 11503, which is a part of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act").<sup>2</sup> Under the statute, Congress has declared that specific taxing acts "unreasonably burden and discriminate against interstate commerce" and that the States may not engage in any of those acts. The statute forbids States to assess property (both real and personal) at a higher fraction of fair market value than they assess other "commercial and industrial property" (§ 11503(b)(1)); to levy or collect a tax based on such an assessment (§ 11503(b)(2)); and to tax rail transportation property at a higher rate than other "commercial and industrial property" (§ 11503(b)(3)). Commercial and industrial property thus forms the comparison class for purposes of testing *ad valorem* property taxes for rate or assessment discrimination. The class includes all property, except land used primarily for agricultural purposes or for growing timber, that is devoted to commercial and industrial uses and that is "subject to a property tax levy." § 11503(a)(4). A fourth and final provision of the Act prohibits discriminatory taxes in a less specific way: it forbids imposing "another tax" that discriminates against a rail carrier. § 11503(b)(4). This subsection, unlike the others, does not specify what types of property or other taxes

<sup>2</sup> The statute was section 306 of the final bill and was originally codified at 49 U.S.C. § 26c. Congress later recodified it as 49 U.S.C. § 11503. In the recodification, Congress altered the language of section 306 slightly. As this Court observed, Congress specifically directed that any changes due to the recodification "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466. *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 459 n.1 (1987). Both the original version of the statute (§ 306) and the current version are reproduced in full in the appendix to the petition for certiorari.

are to be compared in testing whether the treatment of railroad property is "discriminatory."<sup>3</sup>

2. All real and personal property in Oregon, except property expressly exempted, is subject to *ad valorem* taxation and must be assessed and taxed "in equal and ratable proportion." Or. Rev. Stat. § 307.030 (1987). All property must be valued at 100 percent of its fair market value. Or. Rev. Stat. § 308.250 (1987). Oregon taxes railroad cars as "tangible personal property." Or. Rev. Stat. § 307.030 (1987).

Certain classes of business personalty are exempt from *ad valorem* taxation, including agricultural machinery and equipment, business inventories, livestock, poultry, bees, fur-bearing animals and agricultural products in the possession of farmers. Or. Rev. Stat. §§ 307.325, 307.400 (1987). Motor vehicles are exempt from property taxation but are subject to fixed registration fees in lieu of property taxes. Or. Rev. Stat. § 308.585 (1987). Standing timber is also expressly exempt from *ad valorem* taxation, but is subject to a severance tax when it is harvested. Or. Rev. Stat. §§ 307.010(1) (1987), 321.005 *et seq.* (1987).

3. Plaintiffs are corporations, commonly known as "carlines," that lease railroad cars to railroad carriers. They own only personal property. The plaintiff carlines brought this action pursuant to section 11503(b)(4) seeking a declaration that Oregon's property tax unlawfully discriminates against them because it exempts some categories of personal property from taxation (primarily business inventory and standing timber) without giving the same tax exempt status to the property carlines own. Carlines sought to enjoin Oregon from collecting any property taxes on their personal

<sup>3</sup> The original language of section 306 forbade the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this chapter." § 306(1)(d). The recodified language changed the reference to "any other tax" and it became "another tax."

property. In pursuing their claim, carlines did not rely on subsections (b)(1)–(3), which are directed by their terms to discriminatory *ad valorem* property taxation. They sought relief only under subsection (b)(4), the general provision prohibiting "another tax" that discriminates against a rail carrier.

4. The district court entered judgment for the State after concluding that carlines did not meet their burden to show that Oregon's tax on railroads is discriminatory. The district court concluded that Oregon's system of exemptions is neutral in application and is not a pretext for discriminatory taxation. Although the trial court suggested that at some point a State's system of property tax exemptions might become "discriminatory" by exempting most classes of personal property, it found that Oregon's tax system did not approach that threshold.

5. The Ninth Circuit reversed. The court concluded that the sections of the statute that expressly address *ad valorem* taxes were irrelevant to carlines' challenge. As a result, the Ninth Circuit held that by casting their claim as one directed to "discriminatory exemptions" rather than to discriminatory assessment ratios or rates, carlines could bring their suit under § 11503(b)(4) (prohibiting another tax that discriminates against rail carriers). The court held that exempt property may freely "enter the equation" in testing a State's property tax for discriminatory treatment of railroads.

The Ninth Circuit found that at least 25% of all real and personal property in Oregon is tax-exempt. The court, however, expressly disagreed with the district court's analysis that a State's property tax exemptions are "discriminatory" only if the percentage of exempt property is high enough to suggest that railroads are targets of special taxation. Instead, the court of appeals concluded: "[A]ny exemption not also available to railroads [with a possible *de minimis* exception] violates the statute." The Ninth Circuit held that carlines are entitled to the same total exemption "preferred property



owners" enjoy, and it enjoined Oregon's collection of any *ad valorem* tax on carlines' transportation property.

### SUMMARY OF ARGUMENT

Carlines may not rely on section 11503(b)(4) to challenge Oregon's property tax as discriminatory. The first three subsections of the statute are directed in detailed terms to the bases for challenging personal and real property taxes. Subsection (b)(4) follows those subsections, and forbids a State from imposing "another tax" that discriminates against railroad property. Under the plain language of the statute, the provision is available only to test "other" allegedly discriminatory taxes. It does not provide an additional or different basis for challenging a State's general property tax. The words Congress used are as plain as language can be.

If resort to legislative history is appropriate to determine the statute's scope, the legislative history confirms that Congress said what it meant. Congress added the final provision at the request of representatives of the railroad industry. They specifically asked that the language be added so railroads that pay taxes other than property taxes (*e.g.*, gross receipts taxes) would have the protection of the statute. Nothing in the legislation history suggests any broader purpose. Courts, including the Ninth Circuit, that find in this subsection a congressional purpose to prohibit tax discrimination against railroads in "all its guises" have misread or misunderstood the language and its history.

Even if subsection (b)(4) can be used to challenge a property tax on transportation property, the statute forecloses a claim that the tax is discriminatory merely because other types of property are exempt. In drafting the provisions that address rate and assessment discrimination, Congress deliberately chose to give States latitude to promote economic development, industrial growth, natural resource protection, and similar policy objectives through their tax

structures. Congress determined that the tax treatment of transportation property should be compared only to similarly situated property, not all property in a taxing district. Congress structured the comparison class accordingly, and its view of what kind of property was similar was precise: not land used primarily for timber and agricultural purposes; only commercial and industrial property; and only property subject to a property tax levy.

The history confirms the importance of the narrow comparison Congress built into the statute. The States repeatedly pressed Congress to preserve their authority to determine what is taxed and what is not. Congressional members were consistently responsive to the States' concerns, even to the point that some sought and obtained assurances that exemption policies in their home States would not be affected. The railroad industry raised few objections to narrowing the comparison class, and it raised no objection to narrowing the comparison to exclude tax exempt property. The statute itself makes clear that while Congress set out to change some State policies, it was equally determined to leave others alone. That choice cannot be respected if a claim of "exemption discrimination" may be brought under subsection (b)(4).

The statute should not be judicially broadened to meet assertions that States may abuse the authority Congress deliberately left untouched. Given the States' heavy dependence on property taxation, fears that States will tax only railroads are more imagined than real. In any event, arguments to expand the statute should be presented to Congress in the first instance. The Court's approach should be cautious where, as here, the statute is an exception to Congress's more encompassing policy of federal non-interference in matters of State taxation. Finally, because the States must look to the political process to protect fundamental interests of this kind, any doubt or uncertainty in the legislative record must be resolved in the States' favor.

But even if a State's system of *ad valorem* tax exemptions can be challenged as discriminatory, the Ninth Circuit was wrong in holding that a tax on transportation property is *per se* discriminatory if any other property is exempt. Congress expected that States would both tax transportation property and exempt other categories of property from taxation. Preserving that authority was part of the political compromise Congress struck. Necessarily, a state tax on transportation property cannot be invalidated solely on the basis that there is other property in a taxing district that the State does not tax.

The structure of the statute, its history and Commerce Clause principles all suggest the proper test for discrimination. The question is not whether some other property has been specially favored, but whether transportation property has been specially burdened. A State tax satisfies this test if it is facially neutral and generally applicable, and it does not fall on railroads alone or as part of an insular disadvantaged group. If railroads are taxed as part of a large and diverse group of local and out-of-state taxpayers, there is no discriminatory burden on interstate commerce.

Oregon's tax satisfies the proper test. It is levied pursuant to a neutral *ad valorem* tax structure that applies to a wide range of property and a large group of taxpayers. The major categories of personal property that Oregon exempts are the precise types of property Congress intended to permit States to have authority to tax specially. The exemptions reflect real and substantial differences based on the character of the property; they are not pretexts for discriminatory taxation of railroad property. As the district court correctly found, Oregon's tax on transportation property is not discriminatory.

Even if on some theory Oregon's tax structure can be deemed discriminatory, the Ninth Circuit awarded carlines far more than they were entitled to receive. The protection from rate and

assessment discrimination is carefully drawn to equalize taxes on transportation property, not to strike them down in full. Railroads are not entitled to seek the lowest tax rate or assessment given to other property in the comparison class. Rather, a state tax may be enjoined only insofar as it exceeds the hypothetical average tax levied on similar property in the taxing district. Where, as here, the challenge is to a tax levied pursuant to a State's general *ad valorem* tax structure, the statute does not authorize relief in the form of total freedom from taxation.

## ARGUMENT

### I. Introduction.

This case presents the Court with two related questions: (1) when, if ever, does a State's exemption of some categories of property from its general property tax system render its tax on railroad property discriminatory; and if the tax is discriminatory, (2) when, if ever, is the appropriate remedy to relieve railroad property of all taxation? Carlines and the Ninth Circuit gave the same answer to both questions: "Always."<sup>4</sup>

Carlines' complaint relied exclusively on subsection (b)(4), the provision directed to "another tax" that results in discriminatory treatment of railroads. Implicitly, they disavowed reliance on subsections (b)(1) through (b)(3), which address real and personal property taxes specifically. Presumably, this narrow casting of the claim was by design. In other cases, lower courts uniformly have concluded that subsections (b)(1) through (b)(3) do not permit the

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<sup>4</sup>Carlines' complaint detailed the categories of personal property that Oregon exempts from *ad valorem* taxes. J.A. 7, ¶ 21. In their first cause of action, carlines alleged that none of their personal property qualifies for exemption. J.A. 8, ¶ 31. Carlines then asserted: "the imposition of any personal property tax on plaintiffs, when the personal property of other taxpayers in Oregon is not taxed, violates Section [11503(b)(4)]." J.A. 8, ¶ 33 (emphasis added). Thus, carlines advocated the precise *per se* rule the Ninth Circuit adopted: "any exemption not also available to railroads violates the statute" and that carlines are entitled to total exemption.



tax treatment of railroad property to be compared to the treatment of exempt property. Rather, Congress deliberately designed the comparison class to exclude property that States exempt from taxation altogether. *E.g.*, *Dept. of Revenue, State of Fla. v. Trailer Train Co.*, 830 F.2d 1567, 1571-73 (11th Cir. 1987)(citing and discussing representative cases). Indeed, one of the plaintiff carlines in this lawsuit (ACF) had challenged identical features of Arizona's tax system on the same theory advanced here, except that suit was brought under subsection (b)(1).<sup>5</sup> Having lost that challenge in the same circuit in which this case would be brought, ACF and the other plaintiffs not surprisingly did not rely on subsections (b)(1) or (b)(3) again. Instead, they challenged Oregon's property tax as "another tax" that results in discriminatory treatment of their transportation property, in violation of subsection (b)(4).

## II. The Plain Language of Subsection (b)(4) Limits it to Non-Property Taxes.

Carlines were not entitled to challenge Oregon's *ad valorem* taxes on their property under subsection (b)(4). On its face, and by virtue of its straightforward text, that subsection is limited to taxes other than property taxes. Carlines were obligated to fit their challenge within the terms of subsections (b)(1) to (b)(3), or not bring it at all.

Section 11503 declares certain acts in taxing transportation property to unreasonably burden and discriminate against interstate commerce. It then lists four prohibited actions. The first three are directed specifically to state *ad valorem* property taxes, both real and personal. The first subsection prohibits a State from assessing

<sup>5</sup> In the suit, ACF claimed that business inventory, which Arizona exempts from taxation, should be part of the comparison class in determining whether assessment ratios applied to railroad property were excessive. The primary difference between that lawsuit and this one is that in the Arizona litigation, the carlines claimed entitlement to a lower tax rather than to no tax at all. *ACF Industries, Inc. v. State of Ariz.*, 714 F.2d 93, 94 (9th Cir. 1983).

transportation property at a ratio that exceeds the ratios applied to other commercial and industrial property. The second prohibits levying or collecting a tax based on an excessive assessment. The third prohibits applying a tax rate to transportation property that is higher than the tax rate applicable to commercial and industrial property. Subsection (b)(4) is the last of the four prohibitions, and forbids a state from imposing "another tax" that results in discriminatory treatment of a common carrier.

The word "another" is a word of contrast; it necessarily takes its meaning from what precedes it. Here, what precedes it are three subsections that explicitly and in detailed terms address state *ad valorem* taxation of real and personal property. If the words "another tax" are to have any content at all, they must be a reference to taxes other than property taxes levied on real and personal property. *Cf. Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133, 147 (1845) (Maryland's promise not to impose "any further tax" on chartered banks should be read in a common sense way to refer to any tax other than the franchise tax described previously in the statute). There is nothing technical or intricate about the idea the language conveys. The first three subsections provide the bases on which property taxes may be challenged. The fourth provides a basis to challenge other taxes. That is the most natural reading of the language; any other requires greater effort.<sup>6</sup>

<sup>6</sup> The most recent lower court decision considering this question similarly has concluded:

Section (b)(4), the last in a series of prohibited practices, follows §§ (b)(1) through (b)(3) which exclusively address property taxes. Because § (b)(4) follows three sections exclusively addressing property taxes, the "any other tax" language unambiguously relates to taxes other than property taxes. This plain reading of § 11503(b)(4) comports with the Supreme Court's ruling in *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, . . . indicating that the express meaning of the 4-R Act should be interpreted on its face

(continued...)



Of course, if the words clearly and unambiguously provide a challenge only to taxes other than property taxes, this Court's task of interpreting the statute is at an end. *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987)(in the absence of a clearly expressed legislative intention to the contrary, the language of the 4R Act must be regarded as conclusive). It is not the Court's prerogative to assess whether Congress made a wise or an unwise policy choice, or whether it was far or short-sighted in its vision. Nor is it the Court's role to cure perceived deficiencies through judicial interpretation. Giving effect to "plain language" is more than a mechanical rule of construction. The rule is, instead, an important accommodation of the legislative process itself:

If we do not take a legislative body at its word, we run the risk of substituting our own normative (and inherently nondemocratic) views, of disrupting the strange political trade-offs that make democracy possible, of — worst of all — polluting a public language of relatively fixed meaning and reference, a language necessary for the public discourse we call self-government.

*Kansas City Southern R. v. McNamara*, 817 F.2d 368, 373 (5th Cir. 1987)(construing section 11503).

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<sup>6</sup> (...continued)

where the terms of the statute are unambiguous. The "any other tax" wording in § 11503(b)(4) compels the conclusion that such section applies only to taxes other than property taxes. . . . To conclude otherwise requires interpreting the word "other" out of § (b)(4). Therefore, plaintiff's assertions of a violation of § (b)(4) by the personal property exemptions contained in Tennessee law is contrary to the plain meaning of such section.

*CSX Transportation, Inc. v. Tenn. State Bd. of Equalization*, 801 F. Supp. 28, 36 (M.D. Tenn. 1992)(on remand).

Concededly, statutory language is rarely free from all doubt.<sup>7</sup> This language, however, is as plain as language can be. To read it to permit a further or different challenge to *ad valorem* taxes would require changing the words, not construing them. The word "another," at a minimum, would have to be excised from the text and the word "any" would have to be inserted in its place.<sup>8</sup> That is not how Congress wrote the provision, nor is it the plain meaning of text that is there.

### III. An Overview of the Statute's History.

If the court concludes that it is appropriate to examine the statute's history to determine Congress's intent behind it, that examination only confirms that Congress meant what it said. Review of the history is not quick work, however. It spans a full 15-year period and was the outgrowth of a long series of bills on both the House and the Senate side. But the effort is worthwhile, for with each subsequent hearing, Congress's objective became more refined.<sup>9</sup> Subsection (b)(4) was added to the legislation in the

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<sup>7</sup> Cf. *National R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. \_\_\_, 112 S.Ct. 1394, 1402 (1992)(few phrases in a complex statutory scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context).

<sup>8</sup> See *United States v. Nordic Village*, 503 U.S. \_\_\_, 112 S.Ct. 1011, 1015 (1992) (statutes must, if possible, be construed to give every word some operative effect).

<sup>9</sup> Failed legislation often is not a reliable guide to legislative intention. Here, however, the several bills and hearings devoted to what ultimately became section 11503 were part of an on-going process of deliberation. Members of Congress, sponsors and opponents alike, from one hearing to the next and one year to the next, frequently referred back to the earlier bills, often introduced written testimony and documentation from prior hearings, and occasionally cross-referenced the earlier congressional records. In general, each new bill and hearing was treated as a continuation of the last. See, e.g., *Hearings on S. 2362 [and related bills] Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 280, 284 (1972)(statement of Philip Lanier, Vice-President, Louisville and Nashville

(continued...)

final two years of deliberations. By then, the section as a whole had taken near-final form. Proponents and opponents had actively debated which state taxing practices would violate the Act and which would not. Congress had largely settled those significant policy issues. The 15-year period thus lays essential groundwork for understanding subsection (b)(4), providing critical insight into why it was added and the limited purpose it was to serve.

#### A. The Initial Railroad Industry Requests for Legislation.

Section 11503 of the 4R Act had its origins in the "DOYLE REPORT," a national transportation policy study requested by the 86th Congress, one portion of which addressed discriminatory state *ad valorem* property taxation of railroad land and rights-of-way.<sup>10</sup> The report concluded that States commonly assessed land owned by railroads at a proportion of full value (assessment ratio) substantially higher than other property subject to the same tax rates. As one possible solution, the report endorsed an "antidiscrimination law" drafted by the American Association of Railroads (AAR) that would require the assessment ratio applied to railroad property to be no higher than the ratio applied to all other property in the taxing district "subject to the same property tax levy." DOYLE REPORT at 465.

In 1964 and 1966, the railroad industry sponsored legislation closely modeled on the Doyle Report's "antidiscrimination tax

<sup>9</sup> (...continued)

Railroad Co.); *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 2 (1968)(statement of Frank H. Weitzel, Assistant Comptroller General of the United States). In short, the history is a single ancestry in which the records over the 15-year period legitimately trace section 11503's full lineage.

<sup>10</sup> Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 86th Cong. 1st Sess. 445-491 (1961)("DOYLE REPORT").

law."<sup>11</sup> The proposed legislation was narrow: it was addressed to the assessment process only, and it was tailored to relieve railroads from the excessive portion of the tax, no more.<sup>12</sup> The railroad industry did not believe tax rates, other kinds of taxes (e.g., gross receipts or use taxes), or *ad valorem* taxation of railroad personal property and rolling stock resulted in discriminatory over-taxation.<sup>13</sup>

By 1967, the railroad industry no longer believed that Congress could protect it from overtaxation of its real property by addressing only the assessment ratios. The AAR therefore expanded its proposed legislation to address discriminatory tax rates as well. Industry representatives urged that even when assessments were equalized, States could apply a higher tax rate to railroad property by specially classifying it, which would leave the overall tax burden disproportionately high. *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the House Committee on Commerce*, 90th Cong., 1st Sess. 6-7 (1967)(testimony of James Ogden, AAR). As Mr. Ogden pointed out: "property taxes are the result of assessment multiplied by rate." *Id.*, at 7 (testimony of James Ogden). To address the possibility that States might evade the assessment limitations through use of discriminatory tax rates, the legislation contained an added section that would invalidate the

<sup>11</sup> H.R. 736, 88th Cong., 2d Sess. (1964); H.R. 4972, 89th Cong., 2nd Sess. (1966).

<sup>12</sup> *Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 18, 31-33, 51 (1964)(James Ogden, AAR); *Hearing on H.R. 4972 and Identical Bills Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 11 (James Ogden), 45 (Dr. Harold Grove, Professor of Economics, at invitation of AAR) (1966).

<sup>13</sup> *Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, at 52 (Ogden).



rate imposed on railroad property to the extent it was higher than the rates on "all other property" in a taxing district. S. 927, 90th Cong., 1st Sess. (1967)(Sec. 25a(c)).

States immediately voiced concern that the comparison class was too broad. They argued to Congress that it was not appropriate to compare the treatment of transportation property to property that, due to unique characteristics that railroad property does not share, is specially taxed for policy reasons (*i.e.*, taxed at lower rates, assessed in some special way, or exempted from taxation altogether). Examples included agricultural land, standing timber and timber property, as well as certain other non-business land (such as homesteads, land owned by veterans, etc.). *Id.*, at 98-99 (testimony of Charles Conlon, National Assoc. of Tax Administrators).<sup>14</sup> The problem was especially acute in the rate section, where railroads might get the benefit of the lowest rate in the taxing district and where the language (unlike the language in the assessment section) arguably would include exempt property in the comparison class. *E.g.*, *id.*, at 100-01 (testimony of Charles Conlon and statements of Senator Magnuson).

Witnesses for the railroads emphasized that the discriminatory feature of State taxation was that it was based on the ownership of the property, rather than what was owned.<sup>15</sup> An AAR spokesman maintained that railroads were not trying to interfere with traditional State prerogatives to give tax exempt status to property or to have special taxing policies based on unique characteristics of certain kinds of property. *Id.*, at 71-72, 82-83 (testimony of James Ogden). He acknowledged that the bill was not clear, however, and

<sup>14</sup> See also *id.*, at 116 (Letter from F.W.H. Hoefke, Chairman, Oregon Tax Commission) and 119 (Letter from George Kinnear, Director, Washington Dept. of Revenue).

<sup>15</sup> *E.g.*, *id.*, at 11 (James Ogden, AAR), 63 (Paul Sanders, law professor) and 78 (Paul Tierney, Vice Chairman, Interstate Commerce Commission).

that the difficulty was finding language that would address the various tax structures of all 50 States without sweeping too broadly. *Id.*, at 21.

The ambiguities of the comparison class troubled Senator Magnuson, who had introduced the bill. The possibility that the legislation would interfere with State authority to determine what is and is not taxed, and otherwise to further legitimate economic policies through their taxing structures, was a significant concern that he believed had to be "cleared up." *Id.*, at 101.

#### B. The Process of Refinement.

The same objections to the ambiguity of the comparison class surfaced when the legislation was re-introduced in 1969. See generally *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969). By then, the States, the railroad industry and the federal Department of Transportation all seemed to agree that the bill needed clarification. State representatives suggested possible amendments, including that the rate section require a comparison to the "tax rate generally applicable to taxable property"<sup>16</sup> and that the comparison class exclude agricultural and timber land altogether.<sup>17</sup> The federal Department of Transportation urged Congress to limit the comparison class to commercial and industrial property, because the agency thought that the legislation unduly infringed on legitimate State policy prerogatives. *Id.*, at 23-24.<sup>18</sup>

<sup>16</sup> *Id.*, at 80-81 (testimony of Charles Conlon).

<sup>17</sup> *Id.*, at 101-02 (letter of George Kinnear).

<sup>18</sup> The Department urged that Congress should find an approach "reasonably satisfactory to the States" because of their need to pursue such "worthy objectives as industrial development, preservation of open space, promotion of the quality of life, natural resource policy and so forth." *Id.*, at 23. A compromise was in order: "While the measure of relief to the carriers would not be as great than under S. 2289 as introduced, some limited form of classification (continued...)



The first major change to the bill came on the floor of the Senate, where members shared the States' concerns that the legislation might create a "new set of inequities" if railroads could take advantage of tax policies unrelated to their property or to efforts to discriminate against them. 116 Cong. Rec. 2023-24 (daily ed. Jan. 30, 1970). The Senate amended the bill to narrow the comparison class so that it would not include agricultural and timber land. *Ibid.* From that time forward, agricultural and timber land remained out of the comparison class in every version of every bill on both the House and the Senate sides.<sup>19</sup>

In 1972, the railroads made a concerted effort to meet the States' objections. The AAR introduced and supported two bills, which in different ways were designed to protect state authority to exempt property from taxation and to further economic goals with their taxing structures.<sup>20</sup> One bill (S. 2841) approached the problem by defining the term "tax rate" to exclude rates or exemptions extended to specified types of property or "for the purpose of promoting the economic development of a taxing jurisdiction or district." Sec 202(b). The other (S. 2362) tied the tax rate comparison to the rate "generally applicable to taxable property in the taxing district." Sec. 27a(3). Both bills incorporated

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<sup>18</sup> (...continued)

would not necessarily be unduly discriminatory in nature. In the Department's view, this compromise approach is justified in the public interest." *Id.*, at 24.

<sup>19</sup> See, e.g., H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2718, 94th Cong., 1st Sess. (1975).

<sup>20</sup> The bills, S. 2362 and S. 2841, were small parts of the omnibus Surface Transportation Act of 1971. *Hearings on S. 2362, Surface Transportation Act of 1971 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 92d Cong., 1st Sess. (1971, 1972). Transportation industry representatives urged that the bills now met the States' concerns about the comparison class. See, e.g., *id.*, 283-84 (Philip Lanier, Vice President of the Louisville and Nashville Railroad and member of AAR); 323 (Frank A. Smith, Transportation Association of America).

amendments that had been made in 1969 and 1970 at the States' behest, and the language of S. 2362 had even been drafted using the suggestions that State representatives had made in prior years. *Id.*, at 291-92 (testimony of Philip Lanier).<sup>21</sup>

The States agreed that the change eliminated the ambiguity that might have given the railroads a "windfall" in the tax rate comparison. *Id.*, at 209 (testimony of Charles Conlon). The fact that agricultural and timber land now was out of the comparison was also important. *Ibid.* One remaining problem with the comparison class, however, was that railroads could still compare the treatment of their property with non-business and non-income-producing property, such as that of residential homeowners. *Id.*, at 203 (testimony of Charles Conlon).<sup>22</sup> Congressional members suggesting limiting the comparison class to "commercial" property. The States supported the further limitation. *Id.*, at 213 (testimony of Charles Conlon). Railroad representatives for the first time voiced firm objections to narrowing the class. *Id.*, at 287-96 (testimony of Philip Lanier); see also 303 (Lanier Letter of January 21, 1972).<sup>23</sup> Congressional members seemed perplexed and frustrated at the railroad industry's unwillingness to be compared with the group to

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<sup>21</sup> Lanier believed that, by requiring comparison to the generally applicable rate on taxable property, the objectionable ambiguity was gone: "[Transportation property] is to be compared only with taxable property — a church is not taxed, we don't get compared; homestead property is not taxable, we don't get compared. If the property is exempted for veterans benefits, we don't get compared with it, because it isn't taxable, and the language of the bill says only taxable property." *Id.*, at 292.

<sup>22</sup> Conlon urged that Congress would put the states in a "straight-jacket" if railroads could claim discrimination on the basis of state tax policies that distinguish income producing property from non-income producing property. *Id.*, at 214.

<sup>23</sup> Lanier viewed other businesses as distinguishable in various ways. For example, he believed that other businesses can move out-of-state, they often get a better rate of return, and they seemed simply to be less concerned than railroads with discriminatory taxation. *Ibid.*

which they seemed most naturally comparable. *Id.*, at 293 (comments of Senators Hartke and Beall).<sup>24</sup> They suggested that the legislation stood little chance of success if it did not contain an acceptable comparison class to test for discriminatory treatment. *Id.*, at 296 (comments of Senators Hartke and Beall). The committee was fully sympathetic to the problem of discriminatory taxation, but it was not willing to correct it by elevating railroads to favored class status.<sup>25</sup>

<sup>24</sup> The Senators commented:

Mr. Hartke: What troubles Beall and me is the difficult position in trying to make this type of distinction. Here you are engaged in a business, and then you say, but you don't want it to be treated as a business. . . .

Mr. Beall: That is one of the things that bothers me. I can't just tax you as a nonbusiness when you are a business, even though less than successful.

*Id.*

<sup>25</sup> The full flavor of the exchange between the Senators and Mr. Lanier is captured best by reading the transcript of the hearing. The following comments from Senator Beall, however, are representative:

Mr. Beall: I don't think we want to move from discrimination to what appears to be favoritism. We want to move to fairness and equality of treatment.

And it is my impression that if you leave the bill the way it is written now, it is favored treatment, rather than equal treatment, for the railroads.

. . . .

Mr. Beall: I am saying I get the impression that you are discriminated against, and we agree you have been discriminated against in taxation. And you are asking for a change, and there is great sympathy. But the change you are requesting sets up a separate, more favored category for railroads than is available for any other form of commerce or business.

I believe if you really want to bring a change that is going to be acceptable, you are going to come up with a classification that puts you in the same slot as all other business.

*Id.*, at 296.

Several parallel and largely identical bills followed before the provisions finally were enacted through the passage of the 4R Act. In each, the comparison class was limited to "commercial and industrial property." In each, timber and agricultural land remained out of the comparison class. In each, the comparison for assessment disparities was limited to property "subject to a property tax levy." Rate disparities were to be measured by the rates "generally applicable" to the property in the comparison class.<sup>26</sup> Overall, the debate appeared settled. The States voiced no further objection to the comparison class. The railroads seemed resigned to accepting the more narrow comparison as a compromise necessary for passage. There is relatively little discussion of the tax discrimination provision after 1972. The only discussion of the comparison class apparently occurred on the House floor, in 1974. At that point, Representative Long questioned whether the bill would interfere with special tax incentives and exemptions granted by States to encourage economic and industrial development. Representatives Staggers, Adams and Kuykendall all assured him that those policies would not be affected. *See generally* Cong. Rec. H-38373-74 (daily ed., Dec. 10, 1974).<sup>27</sup>

<sup>26</sup> E.g., H.R. 16281, 92d Cong., 2d Sess. (1972); S. 3945, 92d Cong., 2d Sess. (1972); S. 5385, 93rd Cong., 1st Sess. (1973); H.R. 12891, 93rd Cong., 2d Sess. (1974). The "generally applicable" language was retained in the rate section but, apparently inadvertently, the qualification of "taxable property" was dropped. As is discussed in this section, however, the final version of the bill passed by Congress ensured that the comparison for both rate and assessment claims was tied to property "subject to a property tax levy."

<sup>27</sup> Mr. Long's concern arose because of an tax incentive Louisiana had just granted for a limited period "in order to encourage economic development in the State." *Id.*, at 38373. Several times, therefore, he qualified his description of the State taxing policies he wanted to protect as "temporary" tax benefits extended to promote certain policies. Representatives Adams, Staggers and Kuykendall responded in categorical terms, indicating that the bill would not interfere with these policies at all. They did not draw any distinction based on temporary or long-standing policies. *Id.*, at 38373-74.



### C. The Final Language and the Addition of Subsection (b)(4).

Only two substantive modifications were formally discussed in the final few years, one of which is relevant.<sup>28</sup> The final subsection prohibiting "any other tax which results in discriminatory treatment" surfaced inconspicuously and was present in some versions of the bills and not others.<sup>29</sup> Initially, the presence of the provision was not deemed by witnesses on either side to be worth mentioning, and railroad industry witnesses in particular attached no significance to it.<sup>30</sup>

<sup>28</sup> The other attempted modification was designed to meet the special needs of the State of Tennessee which, through its state constitution, placed railroad property in a special classification for utilities. At one point, Tennessee attempted to amend the legislation so that the comparison class would be either "commercial and industrial" or "utility" property. *See* Cong. Rec. H-38754, 38755 (daily ed., Dec. 10, 1974). The final Senate version of the legislation, S. 2718, would have exempted any State with a then-existing "reasonable classification" provision in its constitution from the reach of the tax discrimination section. S. 2718, 94th Cong., 1st Sess. (1975)(Sec. 207(d)). The House-Senate Conference Committee deleted that provision from the final bill. S. Rep. No. 94-595, 94th Cong. 2d Sess. 166 (1976).

<sup>29</sup> *E.g.*, compare H.R. 12891, 93rd Cong., 2d Sess. (1974) with H.R. 5385, 93rd Cong., 2d Sess. (1974).

<sup>30</sup> The lack of any substantive significance attributed to the "any other tax" provision is dramatically evidenced by the hearings on H.R. 12891 and H.R. 5385. The two bills were before the same committee simultaneously throughout exhaustive hearings held on the omnibus legislation of which they were a part. The only difference between the antidiscriminatory tax sections of the two was that one (H.R. 12891) contained the "any other tax" subsection, the other (H.R. 5385) did not. The two measures proceeded side-by-side through the hearings (which, transcribed, consume 800 pages) without so much as a single reference to the difference in text or any suggestion that the fourth subsection was of any substantive significance. To the contrary, the witnesses who referred to the two measures described them as if they were identical in scope and effect. *E.g.*, *Hearings on H.R. 12891, H.R. 5385, H.R. 13474, H.R. 10694, and S. 1149 (and all identical and similar bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. (1974)(George M. Stafford, Chairman of the Interstate Commerce Commission) ("H.R. 5385 and H.R. 12891 deal with [tax discrimination] in substantially the same manner."); *id.* at 434 (continued...)

The "any other tax" provision was not mentioned in the hearings until 1975. Approximately two months before the final passage of the 4R Act, the House version of the discriminatory tax section contained a fourth subsection prohibiting "any other tax" that discriminates against transportation property; the Senate version did not.<sup>31</sup> Two representatives of the railroad industry asked the Senate to add the same text to the final Senate bill. Specifically, Stuart Johnson, counsel for the New York Railway, pointed to the House counterpart bill and urged that the Senate version should contain a similar provision forbidding the imposition of "any other tax which results in discriminatory treatment" of rail transportation property. He testified that the provision would protect railroads, like the New York Dock Railroad he represented, that were subject to a gross receipts tax instead of a property tax.<sup>32</sup> Similarly, Stephen Ailes, President of the AAR, testified: "We suggest that the bill should be amended by adding a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions listed above."<sup>33</sup> The "any other tax" provision was added to Senate version of the bill.<sup>34</sup>

<sup>30</sup> (...continued)

(Stephen Ailes, President, AAR) ("The provisions of the two bills are substantially the same."). *See also id.* at 379, 462, 467 (various other witnesses testifying to the same effect).

<sup>31</sup> Compare H.R. 5385, 93rd Cong., 2d Sess. (1974) with *Railroads — 1975 (Part 5): Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1553 (1975)(Working Draft No. 1).

<sup>32</sup> *Id.*, at 1883.

<sup>33</sup> *Id.*, at 1837.

<sup>34</sup> S. 2718, 94th Cong., 1st Sess. (1975).



The final House and Senate versions of the bill, together with the full 4R Act, went to the conference committee. Most of the committee's report is devoted to other aspects of the 4R Act. It explains, however, that the final version of the Senate bill was adopted in full (complete with the "any other tax" provision), except that the committee deleted a provision that would have exempted from the legislation's reach pre-existing State constitutional provisions providing for a "reasonable classification" of property. *See discussion ante* at n.27.

As ultimately adopted by Congress, the statute was particularly straightforward in describing the comparison class. It used a single definition of the term "commercial and industrial property" that applied to both the rate and the assessment provisions:

"commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy.

That was the legislation's final form, which was codified as section 306, and eventually recodified as section 11503.

#### **IV. Carlines' Claim is Not Cognizable Under Subsection (b)(4).**

##### **A. History Confirms that Subsection (b)(4) Does Not Reach Property Taxes.**

Although there are relatively few pieces of legislative history directly discussing the addition of the "any other tax" or "another tax" provision, those that exist provide ample evidence of Congress's intent. When the relevant pieces are viewed in the context of the section's full 15-year history, what Congress had in mind is all the more certain.

Congress was concerned with a specific burden on interstate commerce: overtaxation of railroad property relative to other commercial and industrial property generally. With respect to

general *ad valorem* property taxes, Congress anticipated in detail the circumstances under which a State's tax on railroad property would and would not be deemed discriminatory. The fourth, "another tax" provision was intended to address the same problem of overtaxation if it occurred as a consequence of some other tax. *See generally Western Air Lines v. Board of Equalization, supra*, 480 U.S. at 130.<sup>35</sup> Thus, when Ailes and Johnson asked the Senate to add the provision, as the House already had, they spoke of it only as an "in lieu" tax section, one that would provide a remedy for railroads that were subject to other taxes (*e.g.*, gross receipts) instead of a property tax. Neither they nor any one else (sponsor, opponent, congressional member or committee report) ever suggested at any time that the provision would be an open invitation to raise additional or different challenges to a State's general property tax structure.

##### **B. Subsection (b)(4) is Not a Basis for Testing Exemptions.**

Even if subsection (b)(4) may be read to apply to a State's property tax system, it may not be used to challenge aspects of State *ad valorem* property taxation specifically contemplated in and addressed by the first three sections of the statute. *See Gozlon-Peretz v. United States*, 498 U.S. \_\_\_, 111 S. Ct. 840, 848 (1991) ("A specific provision controls over one of more general application"). At a minimum, the Ninth Circuit should have looked to the statute as a whole for guidance. *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. \_\_\_, 112 S. Ct. 2374, 2384 (1992) (plausible interpretations of isolated portions of a statute should be rejected if they are not tenable in light of surrounding provisions). To the extent the structure of the statute demonstrates that while

<sup>35</sup> The Court in *Western Airlines*, reviewed the legislative history of the 4R Act for light it might shed on later statutes. The Court observed that the language had been used "to describe special taxes on common carriers that operate differently from the generally applicable property tax schemes."

Congress set out to change some State policies, it was equally determined to leave others alone, those choices must be respected. See *West Virginia Hospital v. Casey*, 499 U.S. \_\_\_, 111 S. Ct. 1138, 1147 (1991).

Whatever else Congress may have intended, it plainly did not intend a State's *ad valorem* tax on railroad property to be invalidated merely because a State gives tax exempt status to property a railroad happens not to own. In crafting section 11503 as a whole, Congress directly grappled with and answered the question: "Discriminatory treatment compared to what?" In defining the comparison class, Congress gave three answers in the negative: (1) not compared to non-business property; (2) not compared to agricultural and timber land; and (3) not compared to property that States exempt from taxation altogether.

As to the latter limitation, Congress's intent could not be more clear. The comparison class excludes any property "not subject to a property tax levy." Beginning with the DOYLE REPORT, that language was consistently in the subsection addressed to discriminatory assessments. Language like it eventually was inserted into the provision relating to discriminatory rates. By the time the final version of the legislation emerged from Congress, the "subject to a property tax levy" qualification was part of a single definition applicable to both grounds (excessive rates and excessive assessments) for challenging a property tax levy on transportation property. Lower courts uniformly have concluded that this language plainly means what it plainly says: a claim of discrimination may not be predicated on comparing the *ad valorem* tax on transportation property to the "zero" tax on tax exempt classes of property.

See, e.g., *Dept. of Revenue, State of Fla. v. Trailer Train, supra*, 830 F.2d at 1571-73 (citing and discussing representative cases).<sup>36</sup>

Even if the language left room to doubt Congress's intent, the history removes any uncertainty. The States from the beginning argued that they must have authority to draw lines between what is taxed and what is not. Congress was sympathetic to that need. The railroad industry never suggested that the States' concerns were not legitimate, or that State choices about what was taxed and what was not in any way discriminated against railroads. Ultimately, clarification of the language to ensure that State prerogatives in this area were not affected was a key refinement of the comparison class that the railroad industry itself offered up.

In narrowing the comparison class, Congress effectively preserved for States the bulk of their traditional authority to structure their tax systems free of federal interference. This Court repeatedly has insisted that States be given wide latitude "in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." E.g., *Lehnhausen v. Lake Shore Auto parts Co.*, 410 U.S. 356, 359 (1973) (equal protection challenge to state tax). The point of not interfering with those judgments is to ensure that States are free to raise revenue in ways that best suit the diverse circumstances of their population, wealth, natural resources and local economies. See generally, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512-15 (1937); *Lehnhausen*, 410 U.S. at 359-65. For purposes of section 11503, Congress determined States should have full leeway to apply special taxing policies (*i.e.*, lower rates and assessment ratios) to agricul-

<sup>36</sup> The Eleventh Circuit's discussion of the "subject to a property tax levy" language is particularly thorough. The court went on to conclude that a claim under subsection (b)(4) may include an examination of exempt property, a conclusion we do not endorse in citing to the first portion of the court's analysis.



tural and timber land; they should have full leeway to treat business and non-business properties differently; and they should have full leeway to decide what is or is not taxed. Congress chose to interfere with State prerogatives only to this extent: within the comparison class defined by Congress, States cannot impose a higher tax burden on railroad property than is imposed on the comparison property generally. Within the "class" to which Congress believed railroad property is similarly situated for purposes of comparison, States owed the railroads a level playing field.

Accordingly, subsection (b)(4) cannot be used to challenge a tax on transportation property based on a State's choice to leave some property tax exempt, any more than it can be used to challenge the failure to give transportation property the tax treatment given to agricultural and timber land, or to non-business property. Those challenges simply are foreclosed by the choices Congress made in defining the comparison class in the first three subsections. For the Ninth Circuit to reopen the comparison and fold exempt property back into it nullified the specific policy choices Congress made in the subsections prohibiting discriminatory *ad valorem* taxes expressly.<sup>37</sup> In the process, the court necessarily and improperly "reduced them to trivial application." See *United*

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<sup>37</sup> Significantly, although the Ninth Circuit and plaintiff carlines were willing to fracture the comparison class by bringing tax exempt property back into the comparison, neither the court below nor carlines has ever suggested that the other excluded property (timber and agricultural land, non-business property) could properly be in the comparison. If the choices reflected in the first three subsections have no bearing on the application of the "another tax" provision, it is difficult to see why the comparison class would not be open to these other categories of property as well. The fact that neither the Ninth Circuit nor carlines suggest the comparison under subsection (b)(4) can be so freely re-examined is tacit acknowledgment that the policy choices in the first subsections must be respected. Yet, they offer no principled basis for disrespecting the congressional choice to not to compare railroad property to tax exempt property.

*States v. Nordic Village, supra*, 112 S.Ct. at 1015. All States rely heavily on *ad valorem* property taxes, and no State does so without exempting at least some classes of property. If subsection (b)(4) is available for "exemption discrimination" claims, the statute contains no incentive for a railroad ever to proceed under the subsections addressed to assessments and rates, at least not without throwing a claim of "exemption discrimination" into the complaint as well. A railroad need never be content merely to demand equalization in relation to all other commercial and industrial property that is subject to a property tax. The comparison class can routinely be expanded by proceeding under subsection (b)(4), with the result that the average rate of tax and the average assessment ratio will always be lower because the calculation will include property that effectively bears a "zero" tax.

In concluding that a claim for "exemption discrimination" can be brought under subsection (b)(4), the Ninth Circuit missed the mark completely. The court relied on *dictum* from an Eighth Circuit opinion in which that court asserted that the purpose of section 11503 "was to prevent tax discrimination against railroads in any form whatsoever." *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (emphasis added by Ninth Circuit, Pet. Cert. App-10). In like fashion, other courts have cited *Ogilvie* as authority to say that Congress was concerned with tax discrimination against railroads "in all its guises"<sup>38</sup> and "by any means."<sup>39</sup> But the Eighth Circuit in *Ogilvie* relied more on intuition and less on an actual examination of the statute's history. Congress's objective was not nearly so

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<sup>38</sup> *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), in turn cited by *Department of Revenue, State of Florida v. Trailer Train Co., supra*, 830 F.2d at 1573.

<sup>39</sup> *Alabama Great Southern R. Co. v. Eagerton*, 663 F.2d 1036, 1039-40 (11th Cir. 1981).



sweeping. To the contrary, it consciously and scrupulously declined to ride roughshod over the States in their efforts to fashion rational taxing policies. The refinements the statute went through over its 15-year history were designed to craft it so it would fully reach the problem of overtaxation as Congress defined it, but also so it would reach no further. *Ogilvie*'s observation that the statute was intended to address tax discrimination "in any form whatsoever" is purely apocryphal.

C. The Statute Should Not be Judicially Expanded to Address Some Perceived Potential for Abuse.

The arguments for reading subsection (b)(4) to open federal court doors wide to any and all claims of discriminatory railroad taxation are policy driven, not text or history based. With respect to *ad valorem* property taxation, it is possible to posit hypothetical ways States might circumvent the limitations Congress placed on them in the first three subsections. In particular, it is easy to speculate that States might opt to give tax exempt status to all property except railroad property, thus leaving only railroads subject to the State's *ad valorem* tax.<sup>40</sup> There are, however, at least three reasons why fears of that type do not warrant a judicially expansive construction of the statute.

First, the fear is more imagined than real. The prospect of any State applying its *ad valorem* tax to railroad property only, or even to railroads in conjunction with only a small class of interstate industries, is fanciful. Congress was well-aware of the States' heavy dependence on property tax revenues and the small proportion that derives from taxes on railroad property. See DOYLE REPORT 459 (noting that local governments rely on property taxes for 87% of their tax revenues, only about 2.4% of which is from taxes on railroad property). As a practical matter, tax revenues from railroad

<sup>40</sup> See, e.g., Brief of the Solicitor General in Support of Cert. Pet. at 10.

property, although important, represent too small a share of the commercial and industrial property tax base for States to exempt everything else. That is especially true in States that lack either a sales tax (e.g., Oregon) or an income tax (e.g., Washington), where property tax reliance is especially great.<sup>41</sup> At most, exempting all property except that owned by railroads is an unforeseen, and as yet unrealized, possibility flowing from the congressional decision to leave State tax exemption authority unaffected. That is not a sufficient reason for refusing to give effect to the statute's plain meaning. *Union Bank v. Wolas*, 502 U.S. \_\_\_, 112 S.Ct. 527, 531 (1991).

Second, whatever the wisdom of the congressional design for protection from discriminatory taxes, it is without question the design Congress chose. Congress exhaustively examined state *ad valorem* taxation of railroad property, and it determined in what specific ways State authority should be limited. With respect to State authority to remove property from the tax rolls altogether, Congress consciously adopted a "hands-off" policy. Indeed, Congress was not even asked to interfere with that authority. The problem with the legislation from the beginning was ambiguity; the challenge was finding acceptable language. The railroad industry did not voice so much as one objection to the examples of property that States argued they should be free to tax specially, which included standing timber and business inventory (the major

<sup>41</sup> In 1988, Oregon levied approximately \$2.19 billion in property taxes. Of that, roughly \$790 million was levied on commercial and industrial property. See generally OREGON PROPERTY TAX STATISTICS, Compiled by Research Dept, Oregon Department of Revenue (1988-89). Railroads contributed about \$9 million, or 1.1 percent, to the commercial and industrial total.

categories of exempt property in Oregon).<sup>42</sup> Rather, the railroads themselves offered up a solution and clarified the bill to ensure that tax exempt property was out of the comparison class. If Congress, in adopting this policy, was short-sighted, there was short-sightedness enough to go around. If the railroad industry believes both it and Congress gave the States too much leeway, the solution is to return to Congress in light of their new experience. Whether they can now convince Congress that they appropriately should be considered comparable to standing timber, business inventory, bees and fur-bearing animals is speculative. Their argument, however, should be made to Congress, not to this Court.

Finally, whatever the Court's willingness in the abstract to construe statutes to avoid problems that did not concern Congress, the Court should be particularly averse to that approach here. Section 11503 does not exist as an isolated statement of congressional policy on the subject of state taxation. Rather, it was enacted against the backdrop of and as an exception to the Tax Injunction Act (28 U.S.C. § 1341), which generally precludes federal courts from interfering with state taxing authority. That Act reflects Congress's respect for the States' role as co-equal sovereigns and its recognition that "the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102-03 (1981). To be sure, Congress intended the discriminatory tax provisions of the 4R Act to stand as an express exception to the Tax Injunction Act. See § 11503(c). As an exception to a more encompassing policy, however, section 11503

<sup>42</sup> See, e.g., *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 100 (1969)(letter from George Kinnear); *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 97-98 (1967)(testimony of Charles Conlon and remarks of Senator Magnuson).

should be read to extend only to those circumstances Congress clearly contemplated and chose to address, not to those where Congress's policy is uncertain or, worse, to those Congress never considered. See *Chesapeake W. Ry v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1577 (1992)(courts should not disregard the general policy of non-interference in state taxation except where § 11503 plainly authorizes that interference).

As this Court has concluded, the balance to be struck between Commerce Clause authority and sensitive state interests is largely committed to the political process itself, and in particular to the national legislature. See *Garcia v. San Antonio Metropolitan Transit District*, 469 U.S. 528, 550-52 (1984). Subsection (b)(4) obviously survived the political process because nothing in its plain language or in the representations of those who urged its addition remotely suggested that the years of clarification and compromise that shaped section 11503's primary substantive provisions would be overshadowed by this seemingly unremarkable add-on. If the political process is the protection the States must look to, then the political process must be respected. Plain language must be given force, complete with its political trade-offs and the incomplete protection it may hand those who ask Congress to encroach on powers basic to state sovereignty. The doubts created by silent or uncertain records of legislative intent must be resolved in the States' favor. To unravel the carefully constructed fabric of section 11503 as a whole on the basis of the unarticulated and undebated policies that carlines' would now read into subsection (b)(4), and to do so in an area as delicate as state taxing authority, is not an acceptable balance to strike in federal-state relations.



## V. The Test for Discrimination.

### A. The Ninth Circuit's *Per Se* Test Was Wrong.

Even if subsection (b)(4) may be used to challenge property taxes, and even if railroads may seek to compare themselves to tax exempt property, the question remains: under what circumstances is it discriminatory for a State to exempt some classes of property without also exempting transportation property? The Ninth Circuit held that "any exemption not also available to railroads violates the statute." Pet. Cert. App-17. It thus announced a *per se* rule of discrimination, one that no other federal or state court has ever endorsed.

That test for discrimination is wholly indefensible. Whatever may be said of the breadth of the "another tax" subsection and the limitations of subsections (b)(1) through (b)(3), one conclusion is beyond quarrel: Congress deliberately crafted the statute so that a State's policy choice to give tax exempt status to specific classes of property could not be used to invalidate either the tax rates or assessments applied to railroad property. Necessarily, Congress assumed that States would *both* tax property owned by railroads and exempt other property from any taxation. The Ninth Circuit's holding that any exemption renders any tax on railroad property discriminatory could not be more at odds with Congress's design.

### B. A State Law Discriminates Against Transportation Property If Singles That Property Out For Excessive Taxation.

The term "discrimination" is not self-defining. The notion that someone or something is subjected to "discriminatory treatment" reflects, at bottom, a policy choice about the basis on which it is and is not permissible to treat people or things differently. Subsection (b)(4) does not, by its terms, provide any standard for "discriminatory treatment." It supplies no test for the discrimination, it identifies no comparator or comparison class, it contains no provision for specific relief.

The remainder of the statute, however, fills those voids. See *King v. St. Vincent's Hospital*, 503 U.S. \_\_\_, 112 S. Ct. 570, 574 (1991)(context supplies the meaning of statutory terms). Even within the comparison class, transportation property never is given the same tax rate or assessment as the most favorably treated property in the comparison. Rather, transportation property always receives the benefit of some hypothetical average, even then only by comparison to a carefully limited class of property. Thus, privileges directed to distinguishable groups of taxpayers do not prove discrimination. Discrimination depends instead on singling out transportation property for more severe taxation than similarly situated property bears on average.

The legislative history underscores what the statute itself makes clear. The railroad industry came to Congress complaining that it was discriminated against because railroads were often singled out for a heavier tax burden by virtue of their status as railroads. The industry objected to being placed in a special class for tax rate and assessment purposes. It was unfair, they argued, to tax railroad property more heavily because it was owned by railroads, rather because of the character of what was owned.<sup>43</sup> At the same time, the railroads repeatedly denied that they wanted the benefit of the kind of special taxing policies reflected in the tax breaks and tax exempt status that States give to some classes of property in order

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<sup>43</sup> As several witnesses testified: "The question is, Do you take the character of the owner and discriminate against him when that owner happens to be an interstate carrier?" *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the House Comm. on Commerce*, 90th Cong., 1st Sess. 63 (1967)(Paul Sanders, Law Professor, Vanderbilt University). The bill "would not permit a classification on the basis of ownership to the detriment of the interstate carrier. The interstate carrier could not be treated more disadvantageously." *Ibid.* The provisions are designed to "put an end to the widespread practice of treating for tax purposes the property of common carriers on a different basis than other property in the same taxing district." *Id.*, at 78. (Paul Tierney, Vice Chairman, Interstate Commerce Commission).



to further local social and economic policies.<sup>44</sup> Congressional members time and again concurred. They agreed railroads should not be marked for higher taxes on the basis of their status as railroads.<sup>45</sup> They did not, however, want to interfere with the special taxing policies States often extend to uniquely situated property, nor did they want to elevate railroads to favored class status by giving them the benefit of taxing policies that had no application to transportation property.<sup>46</sup> In short, discrimination resulted from specially burdening railroad property on the basis of its ownership, not from extending tax benefits to other property based on the character the other property.

Congress's objective in enacting section 11503 fits comfortably with conventional understandings of when State taxing practices burden interstate commerce. As the amicus brief filed by the National Governors' Association, *et al*, discusses in some detail, under traditional Commerce Clause principles, a facially neutral state tax is an invalid burden on interstate commerce only if it has a clearly differential impact on out-of-state commerce and lacks a legitimate justification. *E.g.*, *Amerada Hess v. New Jersey Division of Taxation*, 490 U.S. 66, 75 (1989). The legitimacy of the justification, in turn, depends on whether it is independent of the out-of-state character of the business taxed, as for example when

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<sup>44</sup> For example, James Ogden explained: "We are really trying not to, you might say, not to put railroads in a special class. We are trying to get out of being a special class." *Id.*, at 20-21.

<sup>45</sup> As Senator Magnuson aptly observed, the point was to avoid "pick[ing] them out for picking." *Id.*, at 98.

<sup>46</sup> For example, Senator Magnuson, who introduced several of the bills for the AAR, expressly rejected the idea that special tax breaks designed to promote economic growth and similar policies were discriminatory if not extended to railroad property. The Senator pointed out that the railroads themselves had been the beneficiaries of similar special policies as States tried to attract railroad development. *Id.*, at 101.

the tax is justified by differences in the nature of the businesses bearing or not bearing the tax. 490 U.S. at 79.

The structure of section 11503 as a whole, the congressional purposes underlying the statute, and general Commerce Clause principles are congruent in suggesting the appropriate analysis. The essential inquiry should be whether the tax is facially neutral and generally applicable, or whether it falls on railroads alone or as one of a relatively small and insular group. Congress recognized that railroads were easy prey for discriminatory taxation because they do not vote and are not easily moved to friendlier climes. *Western Air Lines, Inc. v. Board of Equalization*, *supra*, 480 U.S. at 131 (examining history of 4R Act and the overall objective of section 11503). When railroads are taxed as a constituent part of a large and diverse group of local and out-of-state taxpayers, they cannot have been singled out for a uniquely heavy tax burden.<sup>47</sup>

Conversely, a State tax could lose its neutral character if it applied to railroad property only, either by reference to the property's ownership or because its terms were directed to characteristics so narrow and finite that they effectively describe only railroad property.<sup>48</sup> Such a tax would single railroads out on the basis of their status as railroads, rather than treat them in common with other similarly situated taxpayers.<sup>49</sup>

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<sup>47</sup> The principle is familiar, with roots almost as old as the Republic. *E.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819); accord *Washington v. United States*, 460 U.S. 536 (1983); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, n.2 (1938).

<sup>48</sup> An example would be a law imposing an exceptionally high property tax rate on any parcel of land less than 40 feet wide and more than one mile in length.

<sup>49</sup> See, *e.g.*, *Western Airlines v. Bd. of Equalization*, *supra*, in which South Dakota's tax, although valid for other statutory reasons, applied only to airline flight property.

C. Oregon's tax on transportation property is not discriminatory.

The Ninth Circuit's *per se* test was one that neither Oregon nor any State could pass; all States have *ad valorem* property tax systems and all States exempt some property from their reach. Correctly analyzed, however, Oregon's *ad valorem* tax on transportation property easily survives carlines' challenge, as the district court found.

The district court examined the neutrality of Oregon's tax structure from a variety of vantage points. It observed that there is no *de jure* discrimination, because Oregon applies the same tax rate and assessment ratio to all taxed property, regardless of type. Pet. Cert. App-28. The court also scrutinized the tax structure for what it described as "*de facto*" discrimination by inquiring into the nature and pattern of Oregon's system of exemptions. The court examined standing timber and business inventories in particular, and concluded that they did not reflect "backdoor" discrimination. Rather, for "independently valid reasons," they receive either totally exempt status (business inventory) or are taxed under an alternative tax structure (the severance taxes applied to timber when harvested). Pet. Cert. App-30-32. Finally, the district court rejected carlines' claim that the percentage of property that is exempt is so great that, due to percentages alone, the tax on carlines' property is discriminatory. The court assumed, for purposes of argument, that there might be a point at which percentages alone could prove a case, but it found that the percentage here was far lower than carlines claimed. Pet. Cert. App-29-32.

The district court's analysis was correct, and the Ninth Circuit should have affirmed the judgment. Oregon's *ad valorem* property tax system is in all respects generally applicable and neutral on its face. As a starting proposition, Oregon taxes all non-exempt

property using a single assessment ratio (100% of fair market value) and a single rate of tax within the each taxing district. Oregon's system does not distinguish real and personal property, it does not provide for differential rates of any kind (not even as between residential and commercial properties), it does not adjust the assessment ratio upward or downward for any category of property. See generally Or. Rev. Stat. §§ 307.030; 308.250 (1987). The state Department of Revenue has special responsibility to assure uniformity of assessment and property valuations throughout the State. Or. Rev. Stat. § 306.120 (1987). Oregon has extensive procedures to ensure statewide equalization. Or. Rev. Stat. §§ 309.010 *et seq.* (1987).

Of course, as in all tax structures (federal as well as state), Oregon provides for numerous exceptions to the application of *ad valorem* property taxes. Some of the exempt property bears no other tax; some is subject to an alternative form of tax or fee. Because carlines own only personal property, their lawsuit focused exclusively on personal property exemptions. Among those, the major exemptions (in terms of value, not number of affected taxpayers) are standing timber and business inventory. Far less significant, but also in the exempt personal property category, are motor vehicles, agricultural machinery, poultry, livestock, bees and fur-bearing animals.

As the district court concluded, nothing in the nature or the pattern of the tax exempt classes supports an inference that transportation property has been singled out for unusually burdensome treatment. To the contrary, the major categories of exempt property in Oregon are precisely the categories Congress determined States should be free to exempt. During the congressional hearings, the States pointed specifically to business inventory and standing timber. Both served as examples of property that is uniquely situated and frequently justifies special taxing policies for



social and economic reasons (*i.e.*, timber is productive when mature enough to harvest; inventory produces income only when sold).<sup>50</sup> Carlines did not argue that those policies are illegitimate, that the exemptions lack an independently valid purpose, or that they somehow are a pretext for discriminating against transportation property. Their only claim was, in effect, that favoritism directed to categories of property they do not own, no matter how distinguishable that property, is discriminatory if not extended to transportation property as well. That is an argument Congress flatly rejected.

Beyond that, carlines have done no more than attempt to parse the tax base in a way that creates a distinction Oregon's tax laws do not make.<sup>51</sup> By virtue of percentages and numbers only, carlines attempt to suggest that transportation property is subject to *ad valorem* taxation while nearly all other property is not. As carlines approach the analysis, it is irrelevant that the property Oregon exempts is meaningfully different from the property that is taxed, including carlines' property. Similarly, it is irrelevant that scores of other types of business personal property owned by thousands of voting taxpayers also is taxed.<sup>52</sup> Carlines merely fashioned a

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<sup>50</sup> See n.42, *supra*.

<sup>51</sup> Specifically, carlines consistently separate real from personal property and discuss only the percentage of exempt property in comparison to all potentially taxable business personalty. That line is artificial. Oregon's tax structure is not set up to make any distinction between business real and personal property, and there is no reason why it should be analyzed as though it does, other than to distort the inquiry. Without that division, the inflated percentages on which carlines rely largely evaporate.

<sup>52</sup> In Oregon, the railroad industry generally is part of a particularly vast group of voting taxpayers. As already described, Oregon's tax system does not distinguish between real and personal property for rate or assessment purposes, nor does it distinguish between business and non-business real property. Thus, in terms of political clout, railroads are part of a group that includes residential homeowners and similar groups that form an enormously broad local voting

(continued...)

subset of property that cast their figures in the light most favorable to them. Carlines then calculated the percentage of property exempt from that taxation within that convenient subset. For purposes of this Court's review, it should suffice to say that neither the district court nor the Ninth Circuit accepted carlines' totals as accurate. The district court found, and the Ninth Circuit assumed, that transportation property is taxed in common with a large majority of other taxpayers. The approach carlines advocate is, in any event, seriously flawed. If a State's tax is generally applicable and neutral in its terms, and if there is an independently valid reason for the alternative tax treatment given other categories of property, that should be the end of the inquiry. Oregon meets those tests.

#### **VI. The Remedy the Ninth Circuit Ordered Is Not Authorized By Section 11503.**

The Ninth Circuit dealt its final blow to the statute and the policies it is designed to further by enjoining any taxation of carlines' property, rather than enjoining the tax to whatever degree it exceeded of the average tax born by commercial and industrial taxpayers. The state urged below that the language and history of sections (b)(1) through (3) entitled Carlines to no more than a proportional reduction of their taxes (*i.e.*, equalization). Having concluded that it need not consider the language of the preceding sections or the history of the Act in deciding subsection (b)(4)'s reach, the circuit court fashioned its remedy with the same lack of constraining principle. The court specifically rejected guidance from

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<sup>53</sup> (...continued)

majority. That is perhaps best demonstrated by the fact that three years ago Oregon voters passed an initiative measure placing severe limits on the amount of real property taxes the State may levy. Or. Const. Art. IX § 11b (1990). Although the momentum for that reform came in large part from residential homeowners who were frustrated with the particularly high property taxes Oregon taxpayers bear due to the lack of a sales tax, railroad land receives the full benefit of the cap on property taxes.



its own opinions interpreting other provisions of the antidiscriminatory tax section in light of the legislative history,<sup>53</sup> stating they provided "no support" for a proportional remedy under subsection (b)(4). Pet. Cert. App-19. Relying only on *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989), the court agreed with the Eighth Circuit's conclusion that "railroads subject to a discriminatory tax [a]re entitled to the same total exemption preferred property owners enjoyed."<sup>54</sup> The Ninth Circuit ordered that the collection of any tax against carlines' property be enjoined. *Id.* Once again, the court could hardly have shown less fidelity to the language and the history of the statute.

Subsections (b)(1) and (b)(3) provide relief from the excessive portion of a discriminatory tax only. In its original form as subsection 306(1)(a), the statute stated that overassessment of railroad property is prohibited "but only to the extent of any portion based on excessive values as hereinafter described."<sup>55</sup> Similarly, the original form of subsection 306(1)(c) prohibited levying or collecting "any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally

<sup>53</sup> E.g., *State of Ariz. v. Atchison, Topeka & Santa Fe Railroad*, 656 F.2d 398, 404 (9th Cir. 1981) (citing legislative history and concluding under subsection (b)(1) that the comparison should be to the average taxpayer).

<sup>54</sup> There is more than a little irony in this formulation. Oregon does not exempt on the basis of the ownership of property. As a result, although Oregon extends preferences to specified classes of property, the tax structure does not establish any class of "preferred [that is, exempt] property owners." The only class of preferred property owners in Oregon exists by virtue of the Ninth Circuit's decision, i.e., railroads and affiliated industries.

<sup>55</sup> This language was omitted from the statute in recodification. As the Court has pointed out, however, the recodification "may not be construed as making a substantive change in the laws replaced." *Burlington N. R. Co. v. Oklahoma Tax Comm'n.*, supra, 481 U.S. at n. 1 (1987) (quoting 92 Stat. 1466 § 3(a)). Accordingly, the language from the legislation as originally codified is germane here.

applicable to commercial and industrial in the same assessment jurisdiction." Thus, the statute plainly provided, and lower courts have easily understood it to provide, that a court may enjoin only the tax in excess of the hypothetical average tax on property in the comparison class.<sup>56</sup>

History confirms that Congress consciously gave the federal courts authority to enjoin "only the discriminatory portion, that is, the excessive value part of the assessment . . ." S. Rep. No. 91-630, 91st Cong., 1st Sess. 10 (1969). Congressional reports on the legislation unambiguously stated that the assessment comparison was to be to the "hypothetical 'average' taxpayer." *Id.* Those official sources left no doubt that carriers were not entitled to demand the lowest assessment granted to any parcel in the taxing jurisdiction.<sup>57</sup> The same is true of rate discrimination. The States were concerned that the rate provision as initially drafted would entitle railroads to the lowest rate applied to any property in the taxing district.<sup>58</sup> As a result, they asked for and received clarifying language stating that railroads were entitled only to the rate

<sup>56</sup> See, e.g., *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 131 n. 6 (4th Cir. 1983) (viewing statute as containing a "clear mandate" that tax be enjoined only to the extent of the overtaxation); *Ogilvie v. State Bd. of Equalization*, supra, 657 F.2d at 210.

<sup>57</sup> The committee report stated:

Thus, the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property. The reason is obvious since, if the latter were the case, the carrier would be entitled to look for the particular parcel of property in the taxing district which was assessed lowest of all (that is at a lower percentage of its true market value than the percentage applicable to any other parcel in the entire district) and demand similar treatment. This is not the purpose of the legislation . . .

*Id.* at 26.

<sup>58</sup> See *Hearings on S. 927 Before the Subcomm. on Surface Transportation of House Committee on Commerce*, 90th Cong., 1st Sess. 99 (1967) (testimony of Charles Conlon).

generally applicable in the taxing district.<sup>59</sup> With the remedy it gave carlines in this case, however, the Ninth Circuit ordered that which Congress expressly considered and rejected: the tax treatment afforded the most favored taxpayer.

It is discouraging that carlines would ask for and defend that extreme remedy when, before Congress, the railroad industry emphatically disclaimed any objective to be freed from state *ad valorem* property taxes. It was, after all, the AAR that offered up the initial "antidiscriminatory tax law" as an alternative to the Doyle Report's primary recommendation of exempting railroad rights-of-way from state taxation altogether. DOYLE REPORT, *supra* at 465. Time and again, railroad representatives assured Congress that they were seeking tax equalization, not freedom from taxation.<sup>60</sup> Although the industry apparently recognized the futility of seeking tax immunity through the political process, it has no

<sup>59</sup> Charles Conlon proposed that the rate comparison be amended to provide that railroads should receive the be the "tax rate generally applicable to taxable property." *Hearing on H.R. 16245 [and other bills] Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 99-100 (1970). Section 306(1)(c) ultimately referred to "the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction."

<sup>60</sup> For example, when asked by one congressional member if he was suggesting that railroads should not pay taxes, James Ogden replied:

Oh, no sir. . . . We take it as a privilege as far as our company is concerned and all others that I know anything about to pay taxes. We insist that we are good citizens everywhere we operate, and we never stand back from anybody on paying taxes. We think it is our duty to do it and our privilege to do it. But I object to paying too much and more than the other fellow.

*Hearing, on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics, Comm. on Interstate and Foreign Commerce*, 33 (July 28, 1964). *Accord Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 51 (1969)(testimony of Thomas Goodfellow, President of AAR).

hesitance in attempting to achieve that previously forsworn end through the courts.

Whatever the class of property to which railroad property is ultimately compared, one point is beyond dispute: Congress intended that railroads would pay the same taxes the "average" commercial taxpayer pays. The Ninth Circuit's remedy is correct only if, in Oregon, that average taxpayer pays no taxes. For the reasons already discussed, carlines' complaint was properly dismissed. Even if, however, carlines may pursue this claim, they are not entitled to the windfall the Ninth Circuit handed them. Therefore, if this Court does not reverse the Ninth Circuit and affirm the judgment entered by the district court, at a minimum the Court should remand the case for a correct remedy.

### CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
*Petitioner,*

v.

ACF INDUSTRIES, INC., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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**BRIEF OF RESPONDENTS**

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### **QUESTIONS PRESENTED**

1. Whether the Oregon tax at issue here, which fully taxes rail personal property while exempting more than two-thirds of other business personal property, discriminates in violation of 49 U.S.C. § 11503(b)(4).

2. Whether the proper remedy for such a violation of § 11503(b)(4) is to enjoin the tax as applied to respondents' rail cars.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-74

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
v. *Petitioner,*  
ACF INDUSTRIES, INC., *et al.,*  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF OF RESPONDENTS**

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**STATEMENT OF THE CASE**

Petitioner has stipulated that it fully taxes all tangible personal property of respondents while it exempts from personal property taxes at least 67 percent of its business tangible personal property tax base. However else this practice might be described, it plainly is discriminatory. There is no equality in taxation for respondents' personal property as compared to other business personal property. Instead, respondents watch most other taxpayers in Oregon use political influence to obtain special treatment while rail personal property continues to be fully taxed. Amazingly, 17 years after Congress condemned such practices, Oregon maintains this system of gross inequality. It is unlawful and the court of appeals correctly struck it down.

1. *Background.* As the Oregon legislature obviously recognized, railroads “are easy prey for State and local tax assessors” because “they are ‘nonvoting, often non-resident, targets for local taxation,’ who cannot easily remove themselves from the locality.” *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1986) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)); see Pet. Br. 37. Railroads, as interstate carriers, tend to have nonresident customers and nonresident shareholders; accordingly, they are tempting targets for state tax authorities seeking to favor local interests.<sup>1</sup> See R. Posner, *Economic Analysis of Law* 643 (4th ed. 1992). Moreover, “so many railroad assets are at once specialized to railroading and physically immobile that it is very difficult for railroads to escape heavy taxation by transferring the assets to another industry or location; in other words, the ‘exit’ option for limiting political exploitation is denied them.” *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

For decades, States took advantage of the railroads’ vulnerability to discriminatory taxes. In 1961, the “Doyle Report,” as part of its study of the reforms needed to revitalize a struggling railroad industry in the United States, found that “there is a studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates.”<sup>2</sup> The problem was not a new one then. In 1944, “[t]he officials of approximately half the States readily concede[d] that railroads are being over-taxed because of inadequate equalization.” H. Doc. No.

<sup>1</sup> “It is this temptation to excessively tax non-voting, nonresident businesses in order to subsidize general welfare services for state residents that made federal legislation in this area necessary.” *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987).

<sup>2</sup> See S. Rep. No. 445, 87th Cong., 1st Sess. 458 (1961). The Report was informally named after the Staff Director of the Study Group, John P. Doyle.

160, 79th Cong., 1st Sess. (1944). Indeed, four years earlier, this Court had heard and rejected a federal constitutional challenge to similar discriminatory assessment practices in *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940).

After issuance of the Doyle Report, Congress held a series of hearings to consider legislation addressing state tax discrimination against railroads. On the basis of those hearings, Congress found that state tax discrimination against railroads was indeed widespread and concluded “that such discrimination must be ended.” E.g., S. Rep. No. 1085, 92d Cong., 2d Sess. 7 (1972). For example, a 1972 Senate Committee Report reprinted a table listing the 16 States that imposed the greatest excess tax burden on railroads. Those States on average over-taxed railroads relative to other property in the State by almost 40 percent.<sup>3</sup> *Id.* at 6. Congress further noted an “ominous trend”: more and more States were considering shifting from reliance on discriminatory assessments to the use of other means of discrimination, such as higher tax rates on railroad property, “as the most effective means of perpetuating tax discrimination.” S. Rep. No. 630, 91st Cong., 1st Sess. 6 (1969).

Although “[y]ear after year the States . . . asked for postponement of . . . [antidiscrimination] legislation . . . to put their house in order,” discrimination persisted. *Id.* at 15. In 1975, Congress found that because of discriminatory state taxation, “railroads are over-taxed by at least \$50 million each year.” H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

2. *4-R Act.* In response to the profound financial plight of the railroad industry generally and specifically

<sup>3</sup> Twelve of those 16 States (Arizona, Idaho, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Utah) are before this Court as *amici* supporting petitioner. The table was provided to the Committee by the Association of American Railroads.



to the "long-standing burden on interstate commerce" created by discriminatory state taxing schemes, S. Rep. No. 630, *supra*, at 1, Congress enacted section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (Feb. 5, 1976) (the "4-R Act"). The broad purpose of the 4-R Act, as declared by Congress, was "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Id.* § 101(a), 90 Stat. at 33. Integral to achieving this congressional purpose, "particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

That prohibition, as currently codified in § 11503(b) of Title 49,<sup>4</sup> prohibits four "acts" deemed to "unreasonably burden and discriminate against interstate commerce." Pet. Br. 2. Subsection (b)(1) prohibits a State from assessing rail transportation property at a higher ratio to its market value than the ratio of assessed value to market value of other commercial and industrial property in the jurisdiction.<sup>5</sup> Subsection (b)(2) prohibits a State

<sup>4</sup> The language of the original § 306 was "slightly altered" when the provision was recodified in 1978. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987); see Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* Congress expressly directed that these changes in language "may not be construed as making a substantive change in the laws replaced." *Id.* § 3(a), 92 Stat. 1466; see also *Muniz v. Hoffman*, 422 U.S. 454, 467-74 (1975) (recodification presumed not to change substance of law). For the convenience of the Court, we generally will refer to the language of § 11503 as recodified, although we will discuss the original language as necessary to aid in construing the section.

<sup>5</sup> Section 11503(b)(4) defines "commercial and industrial property" as "property, other than transportation property and land

from levying or collecting such a discriminatory tax. Subsection (b)(3) prohibits a State from levying or collecting a property tax that discriminates by taxing railroad property at a higher rate than is generally applicable to other commercial and industrial property in the jurisdiction. Subsection (b)(4), the provision at issue in this case, is a catch-all that prohibits a State from "impos[ing] another tax that discriminates against a rail carrier."<sup>6</sup>

3. *Oregon Personal Property Tax.* Oregon law subjects "all tangible personal property situated within this state, except as otherwise provided by law, . . . to assessment and taxation in equal and ratable proportion."<sup>7</sup> Ore. Rev. Stat. § 307.030. As of January 1, 1988, a total of \$4.8 billion of business personal property in Oregon was taxed. Stipulation Nos. 30, 31, J.A. 18. Although Oregon law requires property not otherwise exempt from tax to be valued and assessed at 100 percent of market value, Ore. Rev. Stat. § 308.250, the parties stipulated that almost half of non-exempt business personal property was not taxed due to undervaluation and underreporting. Stipulation No. 43, J.A. 19 (\$4.4 billion). Respondents' rail cars, however, were assessed

used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy."

<sup>6</sup> The original language of subsection (b)(4), prior to recodification, prohibited "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." § 306(1)(d), 90 Stat. at 54.

<sup>7</sup> "Tangible personal property" is defined as "all chattels and moveables, such as boats and vessels, merchandise and stock in trade, furniture and personal effects, goods, livestock, vehicles, farming implements, moveable machinery, moveable tools and moveable equipment." Ore. Rev. Stat. § 307.020(3). Standing timber is defined as real property, not tangible personal property. *Id.* § 307.010(1) ("Real property" includes . . . all mines, minerals, quarries and trees in, under or upon the land").

and taxed at no less than their full and true cash value.<sup>8</sup> Stipulation No. 29, J.A. 18.

Oregon law exempts from personal property tax non-farm business inventories, a highly mobile factor of production. Ore. Rev. Stat. § 307.400(2), (3)(d). This exemption removed an estimated \$6.8 billion worth of property from Oregon's personal property tax base in 1988.<sup>9</sup> Stipulation No. 33, J.A. 18. Oregon also expressly exempts from the tax agricultural machinery and equipment (Ore. Rev. Stat. § 307.400(2), (3)(a)-(c)); livestock, poultry, bees, and fur-bearing animals (*id.* § 307.400(1)); and agricultural products in the possession of farms (*id.* § 307.325). These exemptions, which uniquely benefit local taxpayers, excluded an estimated \$1.4 billion worth of property from Oregon's personal property tax base in 1988. Stipulation No. 32, J.A. 18.

Oregon exempts most motor vehicles from the personal property tax as well and instead charges a motor vehicle registration fee. Ore. Rev. Stat. § 803.585. In 1988, the registration fee paid on business motor vehicles was a flat \$10 per year, payable to the Department of Motor Vehicles. *Id.* § 803.420(1) (1987). The exemption of business and agricultural motor vehicles excluded an ad-

<sup>8</sup> Most property is assessed locally by county assessors. See Ore. Rev. Stat. § 308.210(1). Railroad property is assessed centrally by petitioner, which determines the "integrated unit of railroad operating properties and then allocate[s] a portion of that value, by means of a formula, to . . . operations in the State of Oregon." *Union Pac. R.R. v. Department of Revenue*, 843 P.2d 864, 866 (Or. 1992).

<sup>9</sup> Oregon law also exempts intangible personal property (money, bonds, notes, etc., see Ore. Rev. Stat. § 307.020(1)) from the property tax. As of January 1, 1986, petitioner estimated the market value of intangible personal property in Oregon to be \$65 billion. Stipulation No. 41, J.A. 19.

ditional \$1.5 billion worth of property from the personal property tax base.<sup>10</sup> Stipulation No. 34, J.A. 18.

As a result of these statutory exemptions, over two-thirds of business tangible personal property in Oregon is exempt from tax.<sup>11</sup> Petitioner acknowledged the effect of these exemptions on the tax burden borne by non-exempt taxpayers such as respondents in a November 1988 report entitled *Oregon's Property Tax System: The Disintegration Continues*, a copy of which appears in the record. In that Report, petitioner explained that "[p]roperty tax exemptions and preferential assessments are significant because they have a direct bearing on the tax base": "[a] broad tax base eases the burden on individual taxpayers while a constricted tax base accentuates the individual taxpayer's burden." *Id.* at 28. Exemptions such as these, according to petitioner, directly "shift[] the cost of services" from property that is exempt to property, such as respondents' rail cars, that is valued at market. *Id.*

4. *Proceedings in this Case.* Respondents are private carline companies that furnish railroad cars for use by railroads, either by leasing the cars to shippers or directly to railroads. Stipulation No. 5, J.A. 12. As explained thoroughly in the Brief for the Association of American Railroads as *Amicus Curiae* at 5, "the carlines are an integral part of the Nation's railway system." The longstanding relationship between the railroads and the carline

<sup>10</sup> Standing timber (which is real property under Oregon law, see *supra* n.7) also is exempt from property tax; instead, standing timber is subject to a severance tax imposed when it is harvested. Ore. Rev. Stat. §§ 321.272, .420.

<sup>11</sup> A total of \$9.7 billion of tangible personal property (\$1.4 billion of agricultural property, \$6.8 billion of business inventories, and \$1.5 billion of motor vehicles) is exempt, and only \$4.8 billion is taxed. When undervalued and underreported personal property is considered, the percentage of property not taxed rises from 67 percent to 75 percent of the total. Stipulation No. 37, J.A. 18-19.



companies is detailed in the AAR's brief. *Id.* at 2-5. The Interstate Commerce Commission has determined that rail cars held under pooling agreements or used, but not owned, by railroads, constitute "transportation property" within the meaning of 49 U.S.C. § 11503(a)(3). Stipulation No. 21, J.A. 16.

a. On October 6, 1988, respondents filed suit in United States District Court for the District of Oregon seeking injunctive and declaratory relief against petitioner's assessment, collection, and levy of taxes on their personal property for the tax year 1988. J.A. 1-2. The complaint alleged that Oregon discriminated against respondents by taxing rail cars at no less than their actual value while exempting a substantial majority of other business personal property, in violation of 49 U.S.C. § 11503(b)(4).<sup>12</sup> The complaint sought an injunction against collection of the tax, either totally or in part. J.A. 8-9. The case was decided by the district court, following argument, on the briefs and stipulated facts.

The district court held for petitioner.<sup>13</sup> Refusing to accept petitioner's argument that subsection (b)(4) does

<sup>12</sup> Petitioner mischaracterizes the record when it asserts that in their complaint respondents "advocated the precise *per se* rule the Ninth Circuit adopted." Pet. Br. 9 n.4. Respondents have consistently taken the position—before the district court, the court of appeals, and now this Court—that the Oregon tax is unlawful because it taxes rail cars in full while exempting over two-thirds of other business personal property. See *infra* pp. 27-33; Pet. App. 16a ("On appeal the parties agree that if a 'majority' of nonrailroad property in Oregon is exempt from the ad valorem property tax imposed upon railroad property, discrimination is demonstrated under [subsection (b)(4)]").

<sup>13</sup> Petitioner argued before the district court that respondents lacked standing to bring a claim under § 11503 because they are not common carriers by railroad. The district court rejected this argument, Pet. App. 27a-28a, petitioner abandoned it on appeal, Pet. App. 7a n.2, and has expressly avowed that the issue "may be considered settled for purposes of review at this level." Pet. 5 n.5. Accordingly, respondents will not discuss this issue further.

not apply to discriminatory exemptions, the district court proceeded to analyze whether the Oregon tax was discriminatory. The court found no *de jure* discrimination under subsection (b)(4) because "Oregon [did] not commit either of the[] discriminatory acts" prohibited by subsections (b)(1) and (b)(3). Pet. App. 28a. The court also found no *de facto* discrimination, although it recognized that the issue posed a "more difficult" question. The court did not limit the relevant comparison to personal property. Instead, the court treated standing timber, which is subject to a severance tax when harvested, see *supra* n.10, as part of its discrimination calculation and held that only 38.2 percent of business personal property in Oregon was exempt from tax, which it concluded was below the line for illegality.<sup>14</sup> Pet. App. 30a-32a.

b. The court of appeals reversed. First, the court rejected petitioner's argument that subsection (b)(4) does not apply to property taxes, concluding that the provision "must be applied to cases of discriminatory property tax exemptions if Congress's purpose in enacting section 306 is to be served." Pet. App. 9a. Second, the court rejected petitioner's argument that the "subject to a property tax levy" language in the definition of commercial and industrial property excludes property tax exemption discrimination from subsection (b)(4): "[t]here is no analogous restriction in the broad language" of subsection (b)(4). Pet. App. 16a. Third, the court held that the Oregon tax violated subsection (b)(4) because "[t]he most natural reading of th[e] language [of the provision] is that the statute is violated by *any* exemption given to other taxpayers but not to railroads."<sup>15</sup> Pet.

<sup>14</sup> On rehearing, the district court stated that standing timber was real property, but nevertheless held that respondents "could not prevail unless standing timber is viewed as exempt from taxation," which, in the court's view, it was not. J.A. 29.

<sup>15</sup> The court of appeals assumed without deciding that petitioner was correct in arguing that (1) real property could be included



App. 16a (emphasis in original). Finally, the court held that the proper remedy for the violation of subsection (b)(4) was to enjoin collection of the personal property tax as applied to respondents' rail cars.

## SUMMARY OF ARGUMENT

### I.

The Oregon tax at issue here, which taxes rail personal property in full while exempting more than two-thirds of other business personal property, unlawfully discriminates in violation of 49 U.S.C. § 11503(b)(4). The plain language of the provision prohibits any property tax that discriminates by fully taxing rail *personal* property while exempting a majority of the *personal* property of other businesses in the State, as the Oregon tax does.

A. The plain language of § 11503(b)(4) demonstrates that it is a catch-all provision that, together with the other provisions of subsection (b), outlaw state tax discrimination against railroads "in all of its guises." *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) (quoting *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)) (emphasis omitted). Accordingly, as the unanimous courts of appeals and the United States as *amicus curiae* in this case have concluded, a State may not, consistent with subsection (b)(4), impose a property tax that discriminates

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with personal property; (2) timber should be ignored in the calculation because it was subject to a severance tax in lieu of a property tax; and (3) undervaluation and underreporting should likewise be disregarded. Under those assumptions, according to the court, 24.7% of all business property in Oregon was exempt from the property tax, which was above any possible *de minimis* level. Pet. App. 17a-18a.

against railroads through exemption of the personal property of other businesses.

The legislative history of subsection (b)(4)—as opposed to the history of the other subsections of § 11503(b) on which petitioner relies—fully supports construing subsection (b)(4) as a catch-all. Congress refused to limit that subsection to taxes "in lieu" of property taxes and rejected an effort to exclude state constitutional classifications of property altogether from § 11503, including subsection (b)(4).

Finally, under the interpretation put forward by petitioner, § 11503 inevitably "would fall far short of its goal of ending discriminatory state taxation." United States Br. 14. Under petitioner's interpretation, fully taxing rail cars while partially exempting other business personal property (by taxing it at a lower rate or assessing it at a lower percentage of market value) would be unlawful, but fully taxing rail cars while totally exempting the other property from tax—which results in far greater discrimination against respondents—would not be. Such an absurd interpretation should be rejected.

B. The Oregon tax here unlawfully discriminates against respondents. The stipulated facts plainly show grossly unequal taxation of respondents: all of their personal property is taxed at no less than its fair market value, but over two-thirds of the personal property of other businesses is completely exempt from tax. By treating respondents' *personal* property differently from the majority of other business *personal* property in the State, the Oregon tax violates § 11503(b)(4).

Respondents' interpretation of subsection (b)(4) is necessary to provide the "political check" on state taxation that petitioner agrees is at the heart of § 11503. Moreover, it is consistent with the core principle embodied throughout § 11503(b), that is, railroad property

should be taxed equally with the general mass of other business property in the State.

Petitioner's contention, that a "generally applicable" tax does not discriminate against railroads if exemptions from the tax can be justified by an "independently valid reason," is without merit. An inquiry into the reasonableness of the exemptions is precluded by the plain language of the statute, which deems such discrimination to be unreasonable. Moreover, such an inquiry would nullify the protections Congress conferred on the railroad industry in subsection (b)(4).

## II.

The proper remedy for the violation of § 11503(b)(4) in this case is to enjoin petitioner from collecting the discriminatory personal property tax from respondents. The Oregon tax discriminates by taxing respondents' personal property differently from more than 67 percent of other business personal property in the State. This discrimination properly is remedied by treating respondents' personal property equally with most other business personal property in Oregon—*i.e.*, by enjoining collection of the unlawful tax.

## ARGUMENT

Petitioner has stipulated that it fully taxes all personal property of respondents while at the same time exempting from personal property taxes at least 67 percent of the personal property owned by other businesses. It defies both common sense and common understanding to describe this arrangement as anything but "discriminatory." Nevertheless, petitioner and its *amici* urge this Court to blink at this gross disparity in treatment, even though Congress in 1976 categorically ordered an end to "any other tax that discriminates" against railroads. They do so by urging on this Court a narrow and technical interpretation of the statute. But no amount of legal legerdemain can hide the basic problem with petitioner's position: Oregon's taxing scheme violates the requirement of basic tax equality embodied in 49 U.S.C. § 11503. Accordingly, the court of appeals correctly declared it unlawful.

### I. THE OREGON TAX AT ISSUE HERE, WHICH DENIES RESPONDENTS EQUAL TAX TREATMENT BY FULLY TAXING RAIL CARS WHILE EXEMPTING OVER TWO-THIRDS OF OTHER BUSINESS PERSONAL PROPERTY, VIOLATES § 11503(b)(4).

"In the present case, the language of § 11503 plainly declares the congressional purpose." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). "In broad terms," *id.* at 457, § 11503 prohibits States from imposing any tax that discriminates against railroads. The taxes described in subsections (b)(1) through (b)(3) are explicitly prohibited, as is "another tax"—"any other tax" in the original language of subsection (b)(4)—that discriminates against railroads. Petitioner perfunctorily contends that its tax is not discriminatory and that the remedy ordered by the court of appeals was excessive. But petitioner's primary—almost exclusive—

argument in this Court is that Congress did not intend to prohibit it from imposing a discriminatory property tax, so long as the tax discriminates only through exemptions and not through disparate assessment ratios or tax rates. In effect, petitioner urges an interpretation of the statute that would permit States to exempt all intangible personal property from tax *except* that of railroads.

The district court and the court of appeals in this case, along with the United States as *amicus curiae* and every other court of appeals that has addressed the question, have flatly and correctly rejected petitioner's extreme argument. The Oregon tax at issue here, which discriminates against railroads by fully taxing rail cars while exempting over two-thirds of the personal property of other businesses from tax, plainly is "another tax that discriminates against a rail carrier." 49 U.S.C. § 11503 (b)(4). It deprives respondents of the very protection Congress intended to afford: equality of tax treatment with the general mass of business property in the State. Accordingly, the court of appeals correctly directed the district court to enjoin collection of this fundamentally unequal tax from respondents.

**A. Section 11503(b)(4) Is A "Catch-All" That Outlaws State Property Taxes That Discriminate Against Railroads By Fully Taxing Railroad Property While Exempting Other Business Property.**

In enacting § 11503, the manifest purpose of Congress was to end discriminatory taxation of railroads by the States. Because § 11503 unquestionably prohibits "another tax that discriminates against" railroads, this Court's "task is simply to ascertain the fair meaning of that term." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2454 (1992). Under the plain language of subsection (b)(4), a state property tax that discriminates against railroads by fully taxing railroad property

while exempting more than half of the property of other businesses is unlawful.

1. Section 11503(b)(4), together with the other provisions of § 11503(b), are broad and all-encompassing in their prohibition of discriminatory state taxes. Section 11503 does not exclude any state taxes, imposed on property or otherwise, or any method of effecting discriminatory treatment from its ban on discrimination. To the contrary, the plain language of § 11503 prohibits state tax discrimination against railroads "in all of its guises," including through property tax exemptions. *E.g.*, *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) (quoting *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)) (emphasis omitted). Had Congress intended to exclude property taxes or some other sort of state tax altogether from the reach of subsection (b)(4), it readily could have done so, as it did in other legislation. For example, in § 7 of the Airport Development Acceleration Act of 1973, Congress forbids states to levy or collect various charges on air carriers or airline passengers. Congress, however, specifically excluded "property taxes, net income taxes, franchise taxes, and sales or use taxes" from the prohibition. 49 U.S.C. app. § 1513; see *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983). No such exclusion appears in § 11503(b)(4). See *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991) (rejecting interpretation of statutory language when Congress "could easily" have enacted language supporting that interpretation "as it did in contemporaneous statutes").

Likewise, nothing in the language of subsection (b)(4) limits its application to taxes imposed "in lieu" of property taxes, as petitioner suggests the provision should be interpreted (Pet. Br. 25), or otherwise excludes discrim-



inatory exemptions from its reach. Again, Congress is perfectly capable of addressing in-lieu taxes specifically when it so intends. *E.g.*, Airport & Airway Improvement Act of 1982, 49 U.S.C. app. § 1513(d)(3) (subsection prohibiting State from imposing discriminatory taxes on air carriers "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes"); see *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987). In § 11503(b)(4), by contrast, Congress acted broadly and without any exclusions.

Here, as in *Burlington Northern R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987), "the language of § 11503 plainly declares the congressional purpose." That purpose "was to prevent tax discrimination against railroads in any form whatsoever." *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Subsections (b)(1) through (b)(3) of § 11503 list specific taxes that Congress deemed unlawfully discriminatory. Subsections (b)(1) and (b)(2) prohibit a property tax that discriminates against railroads through differential assessment of railroad property. 49 U.S.C. § 11503(b)(1)-(b)(2). Subsection (b)(3) prohibits a property tax that discriminates against railroads through differential tax rates. *Id.* § 11503(b)(3). Following this list of discriminatory taxes, subsection (b)(4) then bars states from "impos[ing] another tax that discriminates against a rail carrier." On its face, (b)(4) is a "catch-all" that outlaws all state taxes that discriminate against railroads *in addition to* those described in subsections (b)(1) through (b)(3).<sup>16</sup> See *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981). By its plain terms,

<sup>16</sup> *E.g.*, *Black's Law Dictionary* 84 (5th ed. 1979) (defining "another" as meaning "additional"); *Webster's New Collegiate Dictionary* 47 (1981) (defining "another" as "being one more in addition to one or more of the same kind").

therefore, subsection (b)(4) prohibits property taxes that discriminate through exemptions.

The language of section 306 prior to its recodification confirms that respondents' interpretation of subsection (b)(4) is not only proper, but compelled. Although petitioner has stipulated that the original language of section 306 is controlling, Stipulation No. 3, J.A. 12, it essentially ignores that language in its brief to this Court. As originally enacted, section 306(1)(d)—the original version of subsection (b)(4)—outlawed "[t]he imposition of any other tax which results in discriminatory treatment" of a railroad. 90 Stat. at 54. Because the term "'any' encompasses 'all,'" the language of section 306 reveals plainly that it was intended as a catch-all. *E.g.*, *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 223 (1991). Indeed, "[i]t would be difficult to imagine statutory language that would be less needful of construction than the 'any other' language used here." *Alabama Great S. R.R.*, 663 F.2d at 1040; see also *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (same). If Congress had intended that the provision not apply to property taxes, it could have prohibited "any tax other than a property tax"; if Congress had intended that the provision apply only to property taxes, it could have prohibited "any other property tax." 663 F.2d at 1039. Instead, Congress broadly prohibited "any other tax which results in discriminatory treatment" of railroads, unambiguously covering both discriminatory property taxes and non-property taxes and unambiguously prohibiting taxes that discriminate both through exemptions and otherwise.

The United States, as *amicus curiae*, agrees that subsection (b)(4) applies generally to property taxes and specifically to discriminatory property tax exemption prac-

tices. The United States firmly concluded, both at the certiorari stage and on the merits in this case, that "Subsection (b)(4) prohibits tax discrimination against 'rail carriers' in any form and by any method," including through exemptions of other business property. United States Br. 12-13; see also *id.* at 11 ("under Subsection (b)(4), the States are precluded from employing property tax exemptions in a manner that results in discrimination against rail carriers"); United States Br. 10 (at petition stage) ("[property tax] exemptions are properly to be considered in determining whether the State has, by this other tax method, effected discrimination against rail carriers").

Likewise, every court of appeals to have addressed the question has held, like the Ninth Circuit in this case, Pet. App. 9a-16a, that subsection (b)(4) is a catch-all provision that prohibits property taxes that discriminate by taxing railroad property in full while exempting other business property. See *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416-17 (8th Cir. 1988) ("Tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d)"), *cert. denied*, 490 U.S. 1066 (1989); *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("§ 306(1)(d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment"); *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985) ("This type of *de jure* discrimination clearly falls within the prohibition of § 306(1)(d)"); *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 473 (8th Cir. 1983) (subsection (b)(4) "proscribes the State Board's discriminatory practice of taxing the Carlines' personal property, while exempting from taxation the personal property of other commercial and industrial taxpayers"); *Ogilvie v. State*

*Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).<sup>17</sup>

The only fair reading of subsection (b)(4) is as a catch-all that, together with subsections (b)(1) through (b)(3), prohibits all state taxes that discriminate against railroads. Accordingly, a state property tax that discriminates against railroads by exempting other business property is covered by the plain language of § 11503(b)(4).

2. The arguments of petitioner and its *amici* to the contrary are not persuasive. Initially, Congress' use of the word "another" to modify the phrase "tax that discriminates" plainly does not limit the provision to taxes other than property taxes.<sup>18</sup> While petitioner is correct that the word "another" "necessarily takes its meaning from what precedes it" (Pet Br. 11), that meaning is not one of "contrast." Instead, the context of its use, coming as it does after a listing of discriminatory taxes, plainly

<sup>17</sup> But see *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 336 S.E. 2d 896, 897 (Va. 1985) (holding that subsection (b)(4) does not apply to discriminatory property taxes). Even petitioner grudgingly admits, in an advocate's understatement, that the "weight of authority" rejects its position. Pet. 17.

<sup>18</sup> Several of petitioner's *amici* previously have argued the opposite extreme—that subsection (b)(4) is *limited* to other discriminatory property taxes and does not apply at all to taxes other than property taxes. See *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 & n.1 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985) (Iowa); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 378-79 (4th Cir. 1985) (Virginia). That position flatly conflicts with the position they take now. See Iowa Br. 3; Wash. Br. 5. Indeed, the position taken by the State of Iowa in *Trailer Train* contradicted the position it took at the same time in another case pending before the same court of appeals. See *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); see also *Trailer Train*, 765 F.2d at 745 & n.1. This opposite position is equally incorrect: as explained above, subsection (b)(4) is most naturally read as a catchall that together with subsections (b)(1) through (b)(3) prohibits all discriminatory state taxes, property and otherwise. See *supra* pp. 15-19.



refers to "additional" discriminatory taxes, not different kinds of taxes.<sup>19</sup> See *supra* pp. 16-17. Such an interpretation does not read the word "another" out of the statute, as petitioner asserts. Pet. Br. 13. To the contrary, it reconciles the provision with the previous ones: subsections (b)(1) through (b)(3) prohibit certain discriminatory taxes, and subsection (b)(4) prohibits any and all others.<sup>20</sup>

Likewise, petitioner's reliance on the statutory definition of "commercial and industrial property" is misplaced. That definition limits comparisons under subsections (b)(1) through (b)(3) to property "subject to a property tax levy"; it does not prevent scrutiny of property tax exemptions under subsection (b)(4). By its terms, the definition of "commercial and industrial property" applies only to subsections (b)(1) through (b)(3), which contain that phrase, and not subsection (b)(4), which does not. Had Congress intended to exclude state prop-

<sup>19</sup> The decisions in *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133 (1845), and *Cami v. Central Victoria, Ltd.*, 268 U.S. 469 (1925), relied on by petitioner (Pet. Br. 11) and its *amicus* the State of Washington (Wash. Br. 8), require no different result. In *Gordon*, the Court invalidated a state tax on shares of stock held by bank stockholders; it refused to limit statutory protection against "any further tax" to any further franchise tax of the sort already imposed on the bank. 44 U.S. (3 How.) at 147. In *Cami*, the Court rejected an attempt by Puerto Rico to impose an additional tax on sugar that would have resulted in a cumulative tax burden in excess of the statutory limit; the authorization to impose "any other impost, excise or tax" was subject to the previously expressed limit. 268 U.S. at 471. Neither case provides any support for construing narrowly the prohibition here against "another tax that discriminates" against railroads.

<sup>20</sup> Nor is the rule that specific provisions control over general ones (see Wash. Br. 8-9) to the contrary. The plain terms of subsection (b)(4) reconcile its general prohibition with the additional specific ones that come before it. See, e.g., *United States v. Powell*, 423 U.S. 87, 90-91 (1975).

erty tax exemptions from scrutiny under subsection (b)(4) it could easily have done so. But it did not.

Even if the phrase "subject to a property tax levy" excludes all exempt property from the comparison made under subsections (b)(1) through (b)(3), an issue that is not before this Court,<sup>21</sup> such an exclusion makes sense only with respect to those subsections. The definition of "commercial and industrial property" limits the properties to which railroad property is to be compared in determining whether assessments and rates are discriminatory. Under subsections (b)(1) through (b)(3), Congress made a determination of what constitutes comparable *property*. Under subsection (b)(4), the subject of protection is not "rail transportation property" but "common carriers by rail." Specific reference to the definition of "commercial and industrial property" is not necessary. For purposes of subsection (b)(4), comparison to other businesses is required because it is clear that Congress intended for railroads and rail property to be treated equally with other businesses and other business property generally.

Petitioner's extensive discourse on the 15-year legislative history of § 11503 also does not aid its cause. Because the language of subsection (b)(4) unambiguously extends to property taxes that discriminate through exemptions, petitioner's "crude gropings into the consistently dark closets of legislative history"<sup>22</sup> are simply

<sup>21</sup> In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987), this Court noted probable jurisdiction in a case presenting that issue under the Airport and Airway Improvement Act of 1982, 49 U.S.C. app. § 1513(d), which does not contain a provision equivalent to subsection (b)(4). The Court did not decide the issue in that case, however, concluding instead that the challenged tax was an "in lieu" tax expressly permitted under that Act. 480 U.S. at 134.

<sup>22</sup> *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 373 (5th Cir. 1987).



"irrelevant." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). When Congress has spoken plainly to the matter at hand, the Court's inquiry comes to an end. *E.g.*, *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). To the extent consideration of the legislative history is appropriate here, however, the brief history of subsection (b)(4)—as opposed to the lengthy history of subsections (b)(1) through (b)(3)—fully supports construing it as respondents urge.

In its analysis of the legislative history, petitioner focuses almost exclusively on Congress' deliberations concerning the statutory definition of commercial and industrial property.<sup>23</sup> After a lengthy discussion of that history, petitioner concludes that by 1972 the "debate appeared settled" that exempt property would be excluded from the comparison class established by that definition. Pet. Br. 21. Now is not the time to debate that history; as stated above, the scope of that provision is not before the Court. But it is plain that anything that might have been settled by 1972 as to subsections (b)(1) through (b)(3) could not have been settled as to subsection (b)(4), which was not even added to the proposed legislation until two years later. See Pet. Br. 22 (noting appearance of subsection (b)(4) in 1974). See generally *Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992) (statements in legislative history that apply only to one section of statute provide "no basis" for construing different section of statute).

Instead, the shorter but more relevant legislative history of subsection (b)(4) dispels any notion that Congress intended to limit the provision to taxes other than property taxes. First, Congress flatly rejected any characterization of the provision as applying only to taxes "in lieu"

<sup>23</sup> In addition, petitioner relies substantially on testimony at congressional hearings, rather than committee reports or even floor debate, in its reconstruction of that legislative history. The value of such evidence in ascertaining Congress' intent is questionable, at best. See *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

of property taxes. Although petitioner and its *amici* make much of the fact that a House Report and a witness at a Senate hearing described subsection (b)(4) as prohibiting imposition of an "in-lieu" tax,<sup>24</sup> they ignore that such a narrow characterization was ultimately rejected by the Conference Committee. The Conference Report described the bill passed by the Senate as prohibiting "the imposition of any other tax which results in discriminatory treatment of any common or contract carrier," and the House amendment as outlawing "the imposition of a discriminatory 'in-lieu tax.'" S. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976), reprinted in 1976 U.S.C.C.A.N. 180. The Report makes clear that "[t]he conference substitute follows the Senate bill." *Id.*

Second, Congress flatly rejected an attempt to limit the scope of § 11503—including subsection (b)(4)—to preserve state constitutional provisions that provided "for a reasonable classification of *property* for State purposes." S. 2718, § 207(d), reprinted in 121 Cong. Rec. S21078 (Dec. 4, 1975) (emphasis added). This "Tennessee amendment," so-called because it was proposed by Tennessee legislators to protect a provision recently added to the Tennessee constitution,<sup>25</sup> on its face would have

<sup>24</sup> Pet. Br. 23; NCSL Br. 16; Wash. Br. 16-17. In any event, that the provision was described in the legislative history as prohibiting discriminatory gross receipts and other in lieu taxes does not exclude other taxes—including property taxes—from the reach of the provision. See *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990) ("the language of a statute . . . is not to be regarded as modified by examples set forth in the legislative history"). Moreover, that discriminatory property tax exemptions were not explicitly addressed in congressional hearings on the proposed legislation (Wash. Br. 25) is not surprising, because such exemptions did not become common until the 1970s and thereafter. D. Netzer, *Personal Property Taxation in the United States* Table 1 & 5 (Sept. 12-14, 1985) (paper presented at Conference of the Committee on Taxation, Resources & Economic Development).

<sup>25</sup> The Tennessee constitutional provision provided that residential and agricultural property was to be assessed at 25 percent of its

permitted not only classification for assessment and rate purposes, but also classifications that totally exempted property from tax.<sup>26</sup> Moreover, unlike the "subject to a property tax levy" language relied on by petitioner, this limitation would have applied to subsection (b)(4) as well as to subsections (b)(1) through (b)(3). The provision was included in the bill that passed the Senate, but an amendment containing the provision was defeated in the House, 121 Cong. Rec. H12814-15 (Dec. 17, 1975), and ultimately the provision was rejected by the Conference Committee as well.

In essence, petitioner's position is that, in enacting § 11503, Congress intended to outlaw state taxes that discriminate against railroads *except* property taxes that discriminate by exempting other business property. Under petitioner's interpretation, it would be unlawful for a State to tax rail cars in full while exempting other business personal property partially from tax by assessing it at a substantially lower percentage of market value than railroad property. But it would not be unlawful to tax rail cars in full while exempting that same property from tax altogether, even though a total exemption would result in greater discrimination against railroads. Such an absurd interpretation should be rejected. See, e.g., *Rowland v. California Men's Colony*, 113 S. Ct. 716, 720

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market value, commercial and industrial property at 40 percent of its market value, and railroad and public utility property at 55 percent of its market value. 121 Cong. Rec. H12815 (Dec. 17, 1975) (statement of Rep. Beard). Opponents of the amendment stated that there were 17 other States "whose constitutions can be so interpreted." *Id.* at H12816 (statement of Rep. Adams).

<sup>26</sup> For example, Congress had previously been told by Charles Conlon of the National Association of Tax Administrators, in testimony cited by petitioner (Pet. Br. 16), that exemptions for timber in certain states were permissible only because of state constitutional provisions in those states permitting such classifications. See *Discriminatory Taxation of Common Carriers, 1967: Hearings on S. 927 Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, 90th Cong., 1st Sess.* 98 (1967).

(1993) (describing "common mandate of statutory construction to avoid absurd results").

The consequence of petitioner's interpretation, as the United States points out, would without doubt be that § 11503 would fall far short of its goal of ending discriminatory state taxation." United States Br. 14. States that previously discriminated by their assessments of railroad property and through imposing higher tax rates on railroad property would merely shift from those sorts of unlawful discrimination to what, under petitioner's view, would be perfectly lawful exemption discrimination. In the extreme case, petitioner's interpretation "would require the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute." United States Br. 11 (at petition stage).

Such a concern is far from "fanciful." Pet. Br. 30. Even if it were true that no State ever would exempt all business property from tax (Pet. Br. 30), States have and will exempt all or most business *personal* property from tax. Indeed, at least ten States currently exempt all or virtually all personal property from tax. See United States Advisory Comm'n on Intergovernmental Relations, *1 Significant Features of Fiscal Federalism: Budget Processes & Tax Systems* 140 (Feb. 1992).

Moreover, in its *amicus* brief the United States describes a number of cases in which States "have employed broad exemption schemes to place discriminatory tax burdens on rail carriers." United States Br. 14-15. For example, in *Burlington Northern R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), Iowa's rollback of personal property taxes resulted in the exemption of "ninety-five percent of personal property owners from taxation" while railroad personal property remained fully taxed. *Id.* at 1224. The *amicus* brief of Association of American Railroads (pp. 20-21) meanwhile details a specific attempt by the State of Kansas to avoid the results of a court decision finding



discrimination under subsection (b)(1) by completely exempting large amounts of personal property. The broad language of subsection (b)(4) was intended precisely to prevent such actions, and should be given full effect. Because the statute can only achieve its objective under respondents' interpretation, the argument by petitioner and its *amici* that the Court should construe the language more "narrowly" to accommodate concerns of federalism is misplaced. It is the antithesis of a "fair" reading of the statute to interpret it so that it does not accomplish its stated goal. See *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992).

In short, as the plain language, purpose, and legislative history of subsection (b)(4) make clear, the subsection can only be understood as a catch-all, designed to prevent states from shifting from discriminatory property tax assessments and rates to other forms of discrimination. A property tax that discriminatorily taxes railroad property while exempting other business property plainly is "another tax that discriminates against" railroads. The court of appeals properly held that § 11503(b)(4) applies to this case.

**B. Oregon's Tax Discriminates Against Railroads By Denying Respondents Equal Tax Treatment.**

The court of appeals also correctly held that the Oregon tax at issue here discriminates against respondents in violation of § 11503(b)(4). That tax is discriminatory because it denies respondents' *personal* property equal tax treatment with the majority of other business *personal* property in Oregon: rail cars are fully taxed while over two-thirds of the personal property of other businesses is exempt.<sup>27</sup> Although the court of appeals, in stating that

<sup>27</sup> When undervalued and underreported property is included, the proportion of other business personal property in Oregon that is not taxed rises to 75 percent.

"any exemption not also available to railroads violates the statute" (with a possible *de minimis* exception), Pet. App. 17a, ruled more broadly than necessary to decide this case, it reached the correct result. Accordingly, its judgment should be affirmed.<sup>28</sup>

**1. At A Minimum, Subsection (b)(4) Prohibits A State From Imposing A Tax That Exempts Most Other Business Personal Property While Fully Taxing Rail Cars.**

Whatever the full scope of the protection provided by § 11503(b)(4) might be, it is plain that a State that taxes rail cars in full while exempting a majority of other business personal property unlawfully discriminates against railroads. Such a tax altogether lacks the "political check" on excessive taxation that the parties agree is at the heart of § 11503 and that Congress expressly incorporated into subsections (b)(1) through (b)(3). Petitioner's contrary contention, that subsection (b)(4) applies only to taxes that explicitly single out railroads and not to taxes that fail to treat railroads equally with other business property, is meritless. Such an interpretation would leave railroads all too easy prey for continued discriminatory taxation by the States, contrary to Congress' manifest intent in enacting § 11503(b)(4).

The parties agree that § 11503 is aimed "to prevent tax discrimination against the railroads [by] t[ying] their tax fate to the fate of a large and local group of taxpayers." *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). Such "[a] 'political check' is provided when a state tax falls on a significant group of state citizens who

<sup>28</sup> The position respondents take here is the same one they took in the district court and the court of appeals: that the Oregon tax is unlawful because it taxes rail cars in full while exempting over two-thirds of the personal property of other businesses in the State. See *supra* n.12. The protection that the broad and flexible language of § 11503(b)(4) might afford under other circumstances can be decided in the appropriate case.



can be counted upon to use their votes to keep the State from raising the tax excessively." *Washington v. United States*, 460 U.S. 536, 545 (1983). Petitioner agrees that this "familiar" principle, "with roots almost as old as the Republic," is directly applicable here. Pet. Br. 37 & n.47 (no discrimination when "railroads are taxed as a constituent part of a large and diverse group of local and out-of-state taxpayers").<sup>29</sup> Indeed, Congress legislated in this area precisely because the railroads' lack of a political voice made them ready targets for discriminatory state taxes. See *supra* pp. 2-3.

To provide this essential political check, subsection (b)(4) should be interpreted, at a minimum, as prohibiting States from taxing railroad personal property in full when most other business personal property is exempt.<sup>30</sup> Under such an interpretation, railroad property will receive the same tax treatment as the majority of other business property, and "the owners of such commercial and industrial property can be expected to provide a strong check against any state discrimination." *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 867 n.11 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983). As this Court stated in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983), "[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." A tax like the Oregon tax here, which exempts over two-thirds of comparable property from the burden it imposes on rail property, lacks a sufficient political check and therefore is unlawful.

<sup>29</sup> The United States concurs. United States Br. 28 ("The object of the statute . . . is to obtain for rail carriers equivalent treatment with the general mass of other taxpayers").

<sup>30</sup> That the proper comparison is between railroad *personal* property and other business *personal* property is clear, for the reasons explained below. See *infra* pp. 38-42.

The other subsections of § 11503(b) confirm that Congress' intent was to ensure that railroad property receive equal tax treatment with the general mass of business property in the jurisdiction. As petitioner points out (Pet. Br. 43), subsection (b)(1) requires railroad property to be treated for assessment purposes the same as the property of the "hypothetical 'average' taxpayer" in the State.<sup>31</sup> Subsection (b)(3) requires railroads to be taxed at no higher rate than the rate at which the majority of commercial and industrial property in the jurisdiction is taxed.<sup>32</sup> Subsection (b)(4), as a catch-all that prohibits

<sup>31</sup> Under subsection (b)(1), the ratio of assessed value to market value of railroad property must be within five percent of the average ratio of assessed value to market value for all commercial and industrial property in the jurisdiction.

<sup>32</sup> Petitioner's flat statement—that "one point is beyond dispute: Congress intended that railroads would pay the same taxes the 'average' commercial taxpayer pays" (Pet. Br. 45)—not only undercuts entirely its attempted evisceration of the substantive standard for discrimination, but is simply wrong with respect to property tax rates. As the language of subsection (b)(3) prior to recodification makes clear, States may not tax railroad property "at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction." § 306(1)(c), 90 Stat. at 54. This "generally applicable" language requires states to tax railroad property at the same rate as that applied to the *majority* of commercial and industrial property in the jurisdiction. *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 867 (9th Cir.) ("The tax rate applicable to the roll that contained the majority of the commercial and industrial property shall be deemed the rate generally applicable to commercial and industrial property"), *cert. denied*, 464 U.S. 846 (1983); see also *General Am. Transp. Corp. v. Kentucky*, 791 F.2d 38, 42 (6th Cir. 1986).

The similar assertion of the United States, that the weighted average tax rate is used when more than one tax rate is applicable (United States Br. 29), is equally incorrect. The weighted average rate is used only when there is no single rate applicable to the majority of commercial and industrial property. When there is such a majority rate, that rate is controlling. *Trailer Train*, 697 F.2d at 867 n.11 ("selection of the rate imposed on the majority

"any other tax which results in discriminatory treatment," should be construed as providing no lesser protection.

Such an interpretation also comports with decisions of the courts of appeals holding state taxes unlawful under circumstances similar to those here. For example, in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), a decision endorsed by the United States in its brief (at p. 21), Nebraska exempted motor vehicles paying registration fees, agricultural products and machinery, and business inventories—the very exemptions at issue here—from its tax on tangible personal property. As a result, 75.75 percent of all business personal property in the State was exempt from the tax. 885 F.2d at 416. The court of appeals held that because "the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against Trailer Train and violates" subsection (b)(4). *Id.* at 418; see also *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.) (personal property tax that exempted all personal property of locally assessed businesses from tax violated subsection (b)(4)), *cert. denied*, 454 U.S. 1086 (1981). *Leuenberger* is indistinguishable from this case and this Court should endorse its requirement of equal tax treatment for rail personal property.

Petitioner's contrary view, that a state tax discriminates against railroads only if "it falls on railroads alone or as one of a relatively small and insular group" (Pet. Br. 37), is too narrow. To be sure, a state tax imposed solely on railroads or rail property would violate subsection (b)(4). *E.g.*, *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991); see United States Br. 21. But the scope of the provision is not so limited.

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of the commercial and industrial property as the base rate is preferable to the selection of . . . the weighted average of the rates imposed on all commercial and industrial property").

The standard proposed by petitioner is wholly inadequate to provide the political check Congress deemed necessary, and which petitioner itself concedes is central to § 11503(b)(4). Petitioner's formulation would "allow the state to discriminate against the railroads by simply making sure that only a few powerless business taxpayers pay" a given tax. *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 375 n.13 (5th Cir. 1987). Such a political check is no check at all. Indeed, the very discriminatory taxes that prompted Congress to enact § 11503 often classified railroads together with public utilities. See, *e.g.*, S. Rep. No. 630, 91st Cong., 1st Sess. 6 (1969). Petitioner's proposed standard would permit States to engage in the same sort of discrimination that required congressional action in the first instance.

Moreover, Congress itself rejected such a standard in the other provisions of subsection (b). While those provisions prevent States from imposing discriminatory assessments and tax rates that "single out" railroads for higher tax burdens, they are not so limited. Thus, even if a substantial amount of business property is assessed at the same assessment ratio as railroad property, a state tax is still unlawful under subsection (b)(1) if the assessment ratio for railroad property exceeds the average ratio for *all* commercial and industrial property. Similarly, even if a substantial percentage (but less than 50 percent) of the property in the jurisdiction is taxed at the same rate as railroads, subsection (b)(3) requires that railroads be taxed at the majority rate, if lower.

In each case, Congress clearly could have legislated solely to bar state assessment practices and tax rates that "singled out" railroads. Yet it did not do so. Instead, Congress determined that greater protection was needed, and thus the guiding principle in the statute is: railroad personal property should be treated no worse than most other business personal property generally. Construing subsection (b)(4) far more narrowly, as petitioner pro-



poses, must be rejected as contrary to the best evidence of Congress' intent derived from the structure of the law.

The suggestion by *amici* National Conference of State Legislatures *et al.* ("NCSL"), that subsection (b)(4)—unlike subsections (b)(1) through (b)(3)—is limited to intentional discrimination, is erroneous as well. The plain language of subsection (b)(4) prior to recodification flatly contradicts such an interpretation: as originally enacted, the provision barred "any other tax which *results in* discriminatory treatment of" railroads. § 306(1)(d), 90 Stat. at 54 (emphasis added). The language prohibiting discriminatory results clearly prohibits disparate impact, not discriminatory intent.<sup>33</sup> See, e.g., *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 386 (1982). NCSL seeks to avoid this plain language by asserting that "Congress' elimination of 'results' language in the recodification belies any suggestion that the language demands an effects test." NCSL Br. 19 n.15. But Congress expressly precluded such a contention by instructing that the recodification "may not be construed as making a substantive change in the laws replaced." See *supra* n.4.

In support of their interpretations, petitioner and its *amici* NCSL rely on interpretative principles derived from this Court's preemption decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). Those principles do them no good. Even if § 11503 were subject to a "fair but narrow" standard of interpretation, which it is not, see *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2454 (1992), that interpretation still must be fair, not just narrow. At a minimum, a fair

<sup>33</sup> Moreover, "Subsection (b) speaks only in terms of 'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer to the intent of the actor." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987). Although the decision in *Burlington Northern* addressed whether a showing of intentional discrimination was required for overvaluation claims under subsection (b)(1), the "acts" language quoted above applies to subsection (b)(4) as well.

reading requires an interpretation that allows the statute reasonably to achieve Congress' purpose, see *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992), not to ignore it altogether as petitioner and NCSL propose to do. Instead, the fair but narrow reading of subsection (b)(4) is that of respondents: a State is prohibited from imposing a tax on railroad personal property while exempting most other business personal property from the tax.

**2. Whether A State Has Rational Reasons For Exempting Other Business Property From Tax May Not Properly Be Considered As A Defense To A Claim Under Subsection (b)(4).**

That a State can offer an "independently valid reason" for exempting other business property from a tax does not excuse the State from treating railroad property the same as other business property—under either subsection (b)(1), subsection (b)(3), or subsection (b)(4). Petitioner's broad argument, and the United States' much narrower argument, to the contrary are meritless.

Petitioner argues that exemptions from a generally applicable tax do not violate subsection (b)(4) so long as those exemptions are based on "independently valid reason[s]." Pet. Br. 41. Nothing in § 11503 supports such a view. To the contrary, an inquiry into the "reasonableness" of a State's discrimination is contrary to the plain language of subsection (b) itself, which deems a tax that discriminates against railroads to be an act that "unreasonably burden[s] and discriminate[s] against interstate commerce." 49 U.S.C. § 11503(b). The original language of § 11503(b) is even more clear: "any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." § 306(1), 90 Stat. at 54.<sup>34</sup> The

<sup>34</sup> See also, e.g., Webster's New Twentieth Century Dictionary Unabridged 522 (2d ed. 1983) (defining "discriminate" as "to make distinctions in treatment, show partiality (in favor of) or prejudice (against)").



language of the section itself makes unnecessary the Commerce Clause-like inquiry into reasonableness that petitioner and its *amici* NCSL propose. In addition, subsections (b)(1) through (b)(3) flatly reject such an inquiry. No matter what "valid reasons" a State may have for assessing commercial and industrial property differently from railroad property, and no matter what "valid reasons" a State may have for taxing commercial and industrial property at a different rate than railroad property, such discrimination is nevertheless unlawful.

Petitioner's proposed interpretation reduces the protection of subsection (b)(4) to a nullity. As petitioner and its *amici* NCSL readily admit, under the deferential standards this Court applies to federal constitutional review of state taxes, which they seek to incorporate into subsection (b)(4), "virtually any exemption for a particular business or piece of property" (NCSL Br. 24) would be valid. Allowing state tax exemptions to be justified by the "obvious state policy of affirmatively encouraging or relieving from burdens, the beneficiary of the exemption" (*id.*), therefore, would leave subsection (b)(4) barren and its protection never to be invoked.<sup>35</sup> As this Court stated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984):

Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its

<sup>35</sup> *Amici* NCSL suggest that the subsection (b)(4)'s "principal function . . . is to enable railroads to come directly to federal court under subsection (c)'s lifting of the bar of the Tax Injunction Act." NCSL Br. 23 n.23. This suggestion simply cannot be reconciled with the language of subsection (b), which on its face provides substantive content to the provision. Moreover, adding a meaningless substantive prohibition to subsection (b) is a bizarre way, to say the least, of creating an exception to the Tax Injunction Act.

nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on the one party, but rather the intent was to confer a benefit on the other.

Congress is presumed not to enact such sterile legislation, see, e.g., *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2455 (1992); *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 151-52 (1979) (Rehnquist, J. concurring), and there is no reason here to disregard that presumption.

The approach proposed by the United States, while more in accord with Congress' obvious intent in enacting § 11503 to protect railroads from discriminatory taxes, nevertheless fails to give full effect to the statutory language. Relying principally on cases involving the doctrine of intergovernmental tax immunity,<sup>36</sup> the United States asserts that a State can "justify" its discrimination by showing " 'significant differences between the two classes.' " United States Br. 18 (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 815-16 (1989)). But, as with petitioner's construction, this reading ignores the original language of § 11503(b), which deems discrimination against railroads to constitute "unreasonable and unjust discrimination against interstate commerce" without a further showing that the discrimination against railroads is itself unjust or unreasonable.

Moreover, the largely standardless inquiry the United States proposes—under which the lower courts are enjoined to evaluate proffered justifications on a case-by-case basis in light of the statutory purpose (United States Br. 21)—in itself is grounds for rejecting the United States' suggestion. Although the United States rejects several possible justifications as insufficient, it leaves open a question of what unspecified justifications might suffice, and ex-

<sup>36</sup> The United States also relies on cases construing the prohibition against rate discrimination of the Interstate Commerce Act. United States Br. 17. The pricing decisions of interstate carriers, however, cannot readily be analogized to the tax policies of a State.

presses no opinion on whether the exemptions at issue here are justified under its approach. *Id.* 22 & n.27. It is difficult to see how the approach proposed by the United States resolves any of the purported confusion that prompted it to recommend that this Court grant certiorari in the first instance. United States Br. 11-14 (at petition stage). Instead, by opening up an undefined inquiry into justifications for exemptions, the approach suggested by the United States will only undercut the workable approach followed to date by the courts of appeals.

If, however, this Court were to adopt the approach outlined by the United States in its brief, it is clear that under that approach the Oregon tax is unlawful and the judgment of the Ninth Circuit should be affirmed. It is beyond dispute that respondents have made out a prima facie case of discrimination, and under the stipulated facts, petitioner cannot justify that discrimination. Accordingly, a remand under the United States' theory to the court of appeals is wholly unnecessary.

Most importantly, the United States' embrace of the Eighth Circuit's decision in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 418 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), as "within the core of 'discrimination'" (United States Br. 21) should end the matter: factually this case is identical to *Leuenberger*. In *Leuenberger*, as described above, see *supra* p. 30, 75 percent of business personal property in the State was exempt; here, under the same exemptions as were at issue in *Leuenberger*, at least 67 percent is exempt. That difference is not material.

In addition, petitioner has wholly failed to proffer any "significant differences" to justify its differential taxation. As this Court made clear in *Davis*, in making this determination "it is inappropriate to rely solely on the mode of analysis developed in our equal protection cases." 489 U.S. at 816. It simply is not enough that "the State has a rational reason for discriminating": "[t]he State's inter-

est in adopting the discriminatory tax, no matter how substantial, is simply irrelevant" to whether there are substantial differences "justifying" the discrimination. *Id.*; see also *Barker v. Kansas*, 112 S. Ct. 1619, 1622-23 (1992). Moreover, as the United States makes clear, an exemption can never be justified on the ground that the property is subject to other taxes to which railroad property is also subject. Thus, for example, "[a] State's exemption of business inventories . . . could not be justified on the ground that such inventories may be expected to generate additional sales, use or income taxes," because the same taxes apply to railroad property. United States Br. 22.

The only justification suggested by the United States as a permissible basis upon which a State might exempt certain property—in this case motor vehicles—is that "the exempt property is subject to alternative state or local taxes that are not levied against railroads."<sup>37</sup> *Id.* Not only is this justification not properly one to be consid-

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<sup>37</sup> As stated previously, standing timber is real property, not personal property, see *supra* n.7, and so is simply irrelevant to this case. See *infra* pp. 38-42. But even if standing timber were treated as personal property, that would only exacerbate, not lessen, the extent of discrimination. Standing timber is exempt from property tax and subject instead to a severance tax imposed when it is harvested. Ore. Rev. Stat. §§ 321.272, .420. But a severance tax is not a tax on property, it is a tax on the harvesting of timber: timber that is not harvested is not taxed. *E.g.*, Ore. Rev. Stat. §§ 321.015, .277, .425. It is a transaction tax, not a property tax. Nor does timber bear a comparable share of the State's property tax burden. In 1988, the timber severance taxes received by Oregon amounted to \$26.4 million. Stipulation No. 40, J.A. 19. Had standing timber been subject to property tax, however, the revenue from that tax, imposed on the stipulated \$11.6 billion in standing timber, would have been approximately \$288 million. See Stipulation No. 42, J.A. 19 (average ad valorem property tax rate for 1988 tax year was 2.489%). If standing timber is included in the calculations, the percentage of exempt property rises to over 80%.



ered,<sup>38</sup> but no factual basis for such a justification has been made—or could be made—in this case. Motor vehicle owners in Oregon plainly do not “bear a comparable share of the State’s tax burden *on property*.” United States Br. 22 (emphasis in original). The fee is not a property tax, but a registration fee, payable to the Department of Motor Vehicles. In 1988, it amounted to a flat \$10 per year for business motor vehicles (Ore. Rev. Stat. § 803.420 (1987)), and would be equivalent to the property tax burden only if the market value of business motor vehicles in Oregon averaged no more than \$400.<sup>39</sup> Therefore, even under the United States’ approach, the Oregon tax violates § 11503(b)(4).

**3. *The Proper Comparison Under § 11503 Is Between Railroad Tangible Personal Property and Other Business Tangible Personal Property.***

Finally, petitioner also is incorrect when it asserts that courts need not separate real property from personal property in evaluating whether a state tax discriminates against railroads. Pet. Br. 40 n.51. Petitioner’s proposal to sweep its discrimination against railroad personal property under the real property rug is baseless. The proper comparison is between railroad tangible personal property and other business tangible personal property, not between railroad tangible personal property and all other business property the State chooses to tax.

It is common ground between the parties that § 11503 preserves State authority to distinguish among traditional, broad classes of property—real, tangible personal, and

<sup>38</sup> See *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 149-50 (1979) (“To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it”).

<sup>39</sup> A \$10 annual registration fee, given the average property tax rate in 1988 of 2.489% (Stipulation No. 42, J.A. 19), would equate to a per-vehicle market value of only \$403.

intangible personal property—so long as railroad property is taxed the same as other property within that class. Only property within those broad classes is comparable for purposes of § 11503: real property is comparable only to other real property, tangible personal property is comparable only to other tangible personal property, and intangible personal property is comparable only to other intangible personal property. Whether understood as based on traditional and long-recognized property law distinctions among those classes, or in terms of their different underlying political constituencies, Congress’ intent to preserve those distinctions is plain,<sup>40</sup> as the courts of appeals have unanimously recognized.<sup>41</sup> Indeed, such a result is essential for the statutory scheme to make sense: otherwise, the exemption from property tax that Oregon<sup>42</sup> provides to intangible personal property would

<sup>40</sup> See S. Rep. No. 1483, 90th Cong., 2d Sess. 10-11 (1968) (act “is not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of real property, tangible personal property, and intangible property”); S. Rep. No. 630, 91st Cong., 1st Sess. 11 (1969) (same). The language of § 11503 does not address this issue. Although prior to recodification § 11503(a)(4) defined “commercial and industrial property” to include “all property, real or personal,” § 306(3)(c), 90 Stat. at 55, that all inclusive definition merely establishes the reach of subsections (b)(1) through (b)(3); it does not purport to require that “all property, real or personal” be taxed at the same rate or the same ratio of assessed to market value, much less that the proper comparison under subsection (b)(4) be made on an all property basis.

<sup>41</sup> See, e.g., *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 132-33 (4th Cir. 1983); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), cert. denied, 454 U.S. 1086 (1981); see also *ABF Freight Sys., Inc. v. Tax Division*, 787 F.2d 292, 298-99 (8th Cir. 1986) (construing Motor Carrier Act of 1980); *Arkansas-Best Freight Sys., Inc. v. Lynch*, 723 F.2d 365, 367-68 (4th Cir. 1983) (same).

<sup>42</sup> All but nine States, like Oregon, completely exempt intangible personal property from tax. Bowman, Hoffer, & Pratt, *Current*



preclude altogether the imposition of property taxes on railroad real and tangible personal property in the State.<sup>43</sup> See also Brief of the Railway Progress Institute *et al.* ("RPI") as *Amici Curiae* 6-17.

While accepting that § 11503 draws these broad lines of comparability, petitioner nevertheless asserts that in this case real property must be grouped with tangible personal property in determining whether Oregon's exemptions discriminate against respondents. According to petitioner, because "Oregon's tax system does not distinguish between real and personal property *for rate and assessment purposes*" (Pet. Br. 40 n.52) (emphasis added), there is no reason to distinguish between real and personal property for other purposes. Petitioner is incorrect on several grounds.

Initially, petitioner is incorrect as a factual matter when it asserts that Oregon does not distinguish between real property and personal property for assessment purposes. The stipulated facts show that, despite the state law requirement that property be assessed at full market value, almost half the value of taxable business personal property in Oregon goes untaxed, either because of undervaluation or underreporting. Stipulation Nos. 30, 31, 43, J.A. 18-19. The record indicates no comparable undervaluation or underreporting of real property, as petitioner itself noted in the district court. See Defendants' Response

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*Patterns and Trends in State and Local Intangibles Taxation*, 43 Nat'l Tax J. 439, 441 (1990). Even in the nine States that tax intangible personal property, intangibles generally are placed "in a property class that typically is taxed at a lower effective rate than most other classes," *id.*, which could well preclude taxing railroad property at any different rate.

<sup>43</sup> As of January 1, 1986, the estimated market value of intangible personal property in Oregon was \$65 billion. Stipulation No. 41, J.A. 19. Although that number is not limited to business intangible personal property, the amount of such property, all of which is exempt from property tax, clearly would dwarf the amount of taxed business real and tangible personal property in the State.

to Court's Question 2 (attached as addendum A to the Reply Brief of Plaintiffs-Appellants in the court of appeals). Thus, notwithstanding the nominal requirements of state law, Oregon *de facto* distinguishes between real and personal property for assessment purposes.

In any event, whether Oregon distinguishes between real and personal property for rate and assessment purposes is beside the point. At a minimum, the question should be whether Oregon distinguishes between real and personal property for exemption purposes, and the answer to that question plainly is yes. Tangible personal property in Oregon is subject to very different tax exemptions from those that the State has granted to real property. For example, retail establishments are subject to tax on the market value of their real property; their personal property, however—such as inventories and delivery vehicles—is substantially exempt from tax. See Ore. Rev. Stat. § 307.400(2), (3)(d) (exempting business inventories); § 803.585 (exempting motor vehicles).

Moreover, what constitutes comparable property under § 11503 cannot be controlled by whether at a given time a State taxes particular classes of property at the same rate and assessment ratio. What Congress intended to be comparable property remains comparable property; the State cannot override congressional intent. See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 129-30 (1987) ("[t]he general principle that, absent a clear indication to the contrary, the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute is to eliminate discriminatory state treatment of interstate commerce"). Because Congress intended the comparisons under § 11503 to be made within the traditional categories of real property, tangible personal property, and intangible personal property, that is what must be done.

The consequence of, and the motivation behind, petitioner's argument should be obvious: by grouping tangible

personal property and real property together, a State could exempt all business personal property from tax yet not be found to violate subsection (b)(4). See RPI Br. 15-17. In many States, including Oregon, the amount of business real property is substantially larger than the amount of tangible business personal property. See Manvel, *A Property Tax Update*, Tax Notes (Feb. 3, 1992), at 609, 611 (real property constitutes 62 percent of total business tangible assets). In those States, including both real and personal property in the comparison would mask the discrimination against rail property that results from the substantial exemptions of other business personal property.

\* \* \* \*

Under the proper standard, Oregon's tax violates subsection (b)(4). The facts are stipulated. The total amount of taxed, business personal property is \$4.8 billion. Stipulation Nos. 30, 31, J.A. 18; see *supra* p. 5. The total amount of exempt business personal property, including motor vehicles, is \$9.7 billion.<sup>44</sup> Stipulation Nos. 32-34, J.A. 18; see *supra* pp. 6-7. Over two-thirds of other business tangible personal property is wholly exempt from tax. Respondents' personal property, meanwhile, "was assessed and taxed . . . at no less than its true cash value." Stipulation No. 29, J.A. 18. By exempting over two-thirds of personal property of other businesses while fully taxing respondents' rail cars, Oregon's tax violates § 11503(b)(4).

<sup>44</sup> When the \$4.4 billion of undervalued and underreported property is included, the amount of untaxed business personal property in Oregon rises to \$14.1 billion, 75 percent of the total. Stipulation Nos. 37, 43, J.A. 18-19. Given the amount of personal property statutorily exempt from tax, however, this Court need not decide precisely how undervalued and underreported property should be considered or under what circumstances exemption of less than 50 percent of business personal property might violate § 11503(b).

## II. THE PROPER REMEDY FOR THE VIOLATION OF SUBSECTION (b)(4) IN THIS CASE IS TO ENJOIN COLLECTION OF THE OREGON TAX AS APPLIED TO RESPONDENTS' TANGIBLE PERSONAL PROPERTY.

The Ninth Circuit properly held that the appropriate remedy for the violation of § 11503(b) in this case was to enjoin petitioner from assessing or collecting Oregon's tax on respondents' tangible personal property. Because Oregon fully taxes rail cars while it completely exempts over two-thirds of other business personal property, an injunction against the tax as applied to respondents' personal property is entirely proper. Under these circumstances, any lesser relief would leave respondents' property in a disadvantaged position relative to most other business personal property in the State, and, thus, would not fully remedy the violation of § 11503.<sup>45</sup>

As demonstrated above, see *supra* pp. 26-42, § 11503(b)(4) mandates that, at a minimum, rail property receive equal tax treatment with most other business property in a State. Under this standard, Oregon's tax is unlawful because it fully taxes respondents' rail cars while exempting over two-thirds of the other business personal property in the State.

The appropriate remedy for such discrimination follows directly from the standard for discrimination itself:<sup>46</sup>

<sup>45</sup> The United States identifies, as a preliminary question, whether § 11503 grants federal courts the power to enjoin violations of subsection (b)(4) at all. United States Br. 24-27. The United States properly concludes, however, that the language creating a five percent threshold for assessment claims, see § 11503(c), must be read as doing only that, and not "strip[ping] all plausible meaning from the language that authorizes federal courts to enjoin 'any acts' in violation of the statute." United States Br. 26-27.

<sup>46</sup> *Cf. Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (stating the "well-settled principle that the nature and scope of the remedy are to be determined by [the nature and scope of] the violation").



if a tax discriminates by treating rail cars differently from the majority of business personal property, the discrimination is properly remedied by treating rail cars the same as most other business personal property. If most other business personal property is wholly exempt from a tax, then rail personal property likewise should not be taxed. Accordingly, the remedy ordered by the court of appeals was appropriate: an injunction against the Oregon tax being collected on respondents' personal property.<sup>47</sup>

The courts of appeals that have addressed similar discriminatory taxes have reached identical conclusions. In *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the court of appeals found that the State of Nebraska violated § 11503(b)(4) by exempting 75.75% of business personal property from its tax on tangible personal property. "The appropriate remedy," the court held, "is to enjoin the collection of the discriminating tax, even though other taxpayers do not receive the same benefits." *Id.* at 418. Likewise, in *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), the court of appeals held that North Dakota violated § 11503(b)(4) by exempting completely the personal property of locally assessed businesses from tax while taxing the personal property of centrally assessed businesses (public utilities and railroads). Again, the court concluded that the appropriate remedy was to treat the "personal property of the railroads [as] exempt from taxation, the same as all other commercial and industrial property." *Id.* at 210.<sup>48</sup>

<sup>47</sup> Whether under other circumstances a court might appropriately order proportional relief need not be decided in this case.

<sup>48</sup> The decision in *Burlington Northern R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), also is consistent with this approach but afforded a different remedy on different facts. The State of Iowa "rolled back" all personal property assessments by a fixed percentage so that the total personal property tax base was equal to the 1973

An order enjoining collection of the tax in part, which petitioner and the United States urge as the appropriate remedy here, would be wholly inadequate to cure the discrimination suffered by respondents in Oregon. Such relief would afford respondents an injunction against 67 percent of the tax on its personal property. But even with such a remedy, rail property still would be discriminated against because it still would be treated differently from most other business personal property in the State, which remains 100 percent exempt from tax.

The reliance placed by petitioner and the United States on the availability of a proportional reduction in tax under subsections (b)(1) and (b)(3) (see Pet. Br. 42-43; United States Br. 29) is misplaced. Petitioner does not, and cannot, contend that the language of subsection (b)(4) mandates partial reduction in tax as the only permissible remedy. For example, subsection (b)(1)—prior to its recodification—described the "prohibited act[]" as the assessment of railroad property at higher than the average ratio of assessed to market value of commercial and industrial property, "(but only to the extent of any portion based on excessive values as hereinafter described)" (emphasis added). The legislative history of the provision explains that "[t]he parenthetical clause beginning with the word 'but' is intended to make

level. It also granted a "credit" against the remaining assessed value. The effect of the rollback and credit was to exclude 95 percent of personal property owners from taxation. Iowa did not, however, afford similar rollback and credits to railroad personal property. The court of appeals held that the failure to provide similar rollback and credits to railroad personal property violated subsection (b)(4). The proper remedy, the court held, was to provide the rollback and credits to railroad property, not necessarily to exempt railroad personal property completely from tax. "[I]f Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like any other substantial property owner." *Id.* at 1224.



clear that only the discriminatory portion, that is, the excessive value part of an assessment is proscribed." S. Rep. No. 630, 91st Cong., 1st Sess. 10 (1969). Subsection (b)(4) has never contained any comparable language.

An order enjoining payment of a tax in part adequately remedies violations of subsections (b)(1) through (b)(3). Reducing the assessment ratio for railroad property to the average assessment ratio for commercial and industrial property remedies a violation of subsection (b)(1). Reducing the tax rate imposed on railroad property to the tax rate imposed on the majority of commercial and industrial property remedies a violation of subsection (b)(3). Enjoining payment of the Oregon tax at issue here in part, however, simply fails to remedy the discrimination. Rather than taxing railroad personal property the same as other business personal property, railroad property continues to be taxed differently.

In the end, petitioner is simply wrong when it states that, by seeking an injunction against the tax here, respondents are "seeking tax immunity." Pet. Br. 44-45. Section 11503 does not immunize railroads from all taxes, but rather prohibits states from imposing discriminatory taxes. Under a proper analysis, Oregon retains full authority to tax railroad real property and to impose personal property taxes on rail cars so long as it ensures that respondents' personal property is not discriminated against when compared to the personal property owned by other businesses in the State. That the necessary and proper remedy in this case is an injunction against the Oregon tax as applied to respondents does not immunize railroads from all taxes, or even from a fair and non-discriminatory personal property tax.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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STATE OF OREGON,

Petitioner,

v.

ACF INDUSTRIES, INC., et al.,

Respondents.

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

At the core of the disagreements between the parties are fundamentally different views of what problem Congress set out to solve in enacting 49 U.S.C. § 11503(b). Respondents and their amici persistently describe the statute as designed to address “discriminatory taxation” in all conceivable shapes and forms. Their central theme is that the States had long engaged in broad-ranging “discriminatory taxing” practices, and that they were determined to continue them so long as any opportunity to do so remained. In respondents’ view, the statute was to serve as an open-ended prohibition on “discriminatory taxes,” one that would provide a complete solution to all present and prospective problems of “discriminatory” state taxation.

That interpretation is simply unfounded. Congress was not presented with nor did it consider a broad array of discriminatory taxing practices. Rather, Congress was asked to address and did address only the discrete problem of direct over-taxation of

railroads resulting primarily from inflated assessments and special rates.

This reply brief supplements the arguments made in our opening brief by focusing on some of the weaknesses in the support respondents offer for their view of Congress's objective. Particularly important among them is respondents' unarticulated assumption that the exemption of property owned by others equates with the direct overtaxation of property owned by railroads. Respondents argue, but they do not show, that when enough non-railroad property is exempt, railroads are forced to shoulder an additional tax burden that they are politically powerless to do anything about. While that effect may result from direct overtaxation of railroads, the practice that concerned Congress, the undertaxation or non-taxation of property owned by other taxpayers has a very different impact. The "discriminatory" burdens that concerned Congress do not flow, either obviously or necessarily, from ordinary State exemption practices, and it cannot be assumed that exemptions are "discriminatory" in the sense that Congress used the term.

**A. The Statute Was Designed To Address Specific Overtaxation Practices, Not Discrimination "In All Of Its Guises."**

A full and fair reading of the legislative history<sup>1</sup> easily refutes several of the misimpressions respondents create (*e.g.*, the image that the States vigorously fought all efforts to equalize taxes on railroad property;<sup>2</sup> that nearly every State was involved in a conspiracy-like effort to place special tax burdens on rail-

<sup>1</sup> Significantly, neither respondents nor their amici take issue with any portion of our description of the legislative history. (Pet. Br. 13-24).

<sup>2</sup> The States frequently expressed support for the general objective of equalizing taxes on railroad property. For example, Oregon officials commended the purpose of the bill and doubted it would have any real application to Oregon because Oregon already had in place an effective process to equalize common carrier property. *Hearings on S. 2289 before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong. 1st Sess. 76, 82 (1969) (letter of Oregon Tax Commission; statement of Gov. Tom McCall).

roads;<sup>3</sup> that the longer Congress delayed, the more oppressive the States' tax practices became;<sup>4</sup> and that the Congress turned a mostly deaf ear to the various concerns the States' raised about the legislation<sup>5</sup>). Given respondents' heavy reliance on their thesis that the statute is addressed to "discrimination in all of its guises," a few supplemental observations bearing on the scope of Congress's "remedial" objective are worthwhile.

1. Respondents persistently refer in generalized terms to congressional concerns with "discriminatory taxation," and they suggest that Congress's focus was general and sweeping from at least the time of the Doyle Report in 1961.<sup>6</sup> But it is only

<sup>3</sup> Actually, the bill was aimed at a minority of States. *E.g.*, S. Rep. No. 1483, 90th Cong., 2d Sess. 14 (1968) ("In the majority of States that now grant equal justice to all taxpayers State property tax assessments, collections or rates would in no way be affected by passage of this bill.") Documents that the AAR submitted to Congress in 1972 identified 16 States that overtaxed railroad property. *E.g.*, S. Rep. No. 1085, 92d Cong., 2d Sess. 7 (1972). And although respondents are quick to point out that 12 of those 16 States are before the Court as amici supporting Oregon (Resp. Br. n.3), they decline to note that Oregon was never identified, in that list or otherwise, as a State with excessive railroad taxation practices. *See also* Doyle Report, at 487 (listing 33 States; Oregon not listed).

<sup>4</sup> At the time of the Doyle Report, the industry estimated that railroads were being annually overassessed approximately \$141 million nationwide. S. Rep. No. 445, 67th Cong., 1st Sess. 487 (1961) (Doyle Report). The overall amount of overtaxation cited by the railroad industry decreased with each successive bill until, by the time of the bill's passage, it had shrunk to only \$50 million despite 15 years of inflation. *E.g.*, H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

<sup>5</sup> Nearly all of the States' collective efforts to narrow the bill met with success. The only unsuccessful effort respondents and their amici cite was the so-called "Tennessee amendment," which was sought primarily by the State of Tennessee to meet its particular concerns. *See generally* Pet. Br. n. 28. Unlike the many changes made at the States' behest, this amendment would not have narrowed the scope of the statute, but instead would have immunized a State from suit under the statute if it had a then-existing constitutional provision allowing for "reasonable classifications" of property.

<sup>6</sup> For example, respondents assert that "[f]or decades, States took advantage of the railroads' vulnerability to discriminatory taxes," and they point

(continued...)



through the imprecision of their terms that respondents can attribute to Congress an overall objective (the wholesale eradication of any and all "discriminatory taxing" impacts and practices) for which there is no evidence. Congress's focus from the beginning was narrow and precise. It was always on particular practices that resulted in inflated state taxes levied directly on railroad property. The Doyle Report did not deal with "discriminatory taxation" in general; nor did it accuse States of engaging in varied and broad "discriminatory" taxing practices. It was concerned — specifically and only — with excessive assessments.<sup>7</sup> When the railroad industry introduced one of the first post-Doyle Report bills in Congress, it explained that the legislation was "very narrowly drawn" and was directed to "a type of discrimination" only.<sup>8</sup> The railroad industry specifically advised Congress that the objective was not to address all concerns the industry might have with state taxing practices, but only the most "pressing and persistent" problem of excessive assessments on railroad property.<sup>9</sup> It urged that the purpose of the bill was to close "only one loophole (but an extremely important one) in the overall tax structure as it applies to the

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<sup>6</sup>(...continued)

back to the 1961 Doyle Report and a 1944 report to the 79th Congress as proof. Resp. Br. at 2-3. Similarly, respondents assert that the Doyle Report was followed by a series of hearings to consider "legislation addressing state tax discrimination," that year after year Congress found that "discrimination persisted," and that eventually Congress concluded that "state tax discrimination was indeed widespread" and must be ended. Resp. Br. 3.

<sup>7</sup> The Doyle Report could not have been more precise in identifying the state taxing practices it considered discriminatory. The problem was in assessments of railroad real property only. Doyle Report, at 457-91.

<sup>8</sup> *Hearing on H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Comm.*, 88th Cong., 2d Sess. 29, 31 (1964).

<sup>9</sup> *Id.*, at 18, 31, 51. See also Doyle Report, at 449-59 (identifying a broad range of state taxes and taxing practices that were not of concern).

railroad industry. Other tax problems confronting the railroads can be dealt with as they become more urgent."<sup>10</sup>

To be sure, in the years that followed, Congress added two additional provisions to ensure that railroad taxes would be equalized effectively. Because the amount of tax paid on property is a consequence of two factors (assessment multiplied by rate), the proposed legislation was modified to include overtaxation through excessive rates. Congress still viewed the legislation as directed to specific overtaxation practices, rather than the broad universe of all possible tax practices or impacts, as the very sources respondents cite for their more sweeping statements make clear. See, e.g., S. Rep. No. 630, 91st Cong., 1st Sess. 9 (1969) (the statute is directed to "a type of discrimination or burden" and declares specific "types of actions" to constitute an unreasonable and unjust discrimination against interstate commerce). And eventually Congress added a subsection addressed to "other taxes" in addition to property taxes, because at least some railroad property was exempt from property taxes altogether and subject to "in lieu" taxes instead. See discussion *post* at pp. 8-12 and Pet. Br. 22-25.

But respondents do not cite so much as one other "discriminatory" tax or taxing practice that the railroads complained of or that Congress considered or addressed throughout the entire 15-year period of congressional deliberations; our review of the legislative history has revealed none. Conspicuously absent from respondents' citations to the voluminous history is a single statement by anyone that this statute would or should address "discriminatory taxes" of all kinds, or "discrimination in all of its guises," or all aspects of the States' taxing structures,

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<sup>10</sup> *Hearing on H.R. 10169, supra*, at 51. Similarly, in 1966, an AAR witness told Congress that it did not need to take on "all possible ramifications of the problem of discrimination" and it should make a "cautious advance step by step" in legislating in the area of state taxation of railroad transportation property. *Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Comm.*, 89th Cong., 2d Sess. 52 (1966) (Paul Sanders, Law Professor, Vanderbilt Univ., appearing for AAR).

practices and policies. The only direct support respondents offer for that proposition is lower court decisions, and they are no more persuasive than they are authoritative on that point.<sup>11</sup>

2. Respondents thus overstate the congressional purpose to eliminate “discriminatory taxation,” while they ignore completely Congress’s complementary objective: to preserve certain of the State’s taxing prerogatives. Congress was neither unaware of nor indifferent to the difficulties States face in fashioning rational taxing structures. A key prerogative that the States argued to preserve was their ability to draw lines between what is taxed and what is not. As we have described at length, that authority was deemed critical to the States’ ability to pursue important economic and social policies, and the examples that States cited included special taxation policies for business inventories, standing timber, motor vehicles, and other property similar to the categories that Oregon exempts.<sup>12</sup> Congress was both sympathetic and responsive to the States’ concerns, and eventually it crafted the comparison class to provide a blanket exclusion for all property not “subject to a property tax levy.”

Respondents do not dispute the meaning of that language, or the fact that it reflects a deliberate decision by Congress to compare the tax treatment of rail transportation property only to that of other *taxed* business and commercial property.<sup>13</sup> They

<sup>11</sup> The origin of this view of Congress’s broad objective is *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981). *Ogilvie* offers no legislative history or other authoritative source for its observation, which was unnecessary to its holding. Lower courts, nonetheless, frequently cite *Ogilvie* and rely on it. Over time, the idea that Congress was seeking to eliminate “discrimination in all of its guises” has, myth-like, continued to be repeated by other courts without an examination of the legitimacy of the source of the statement. See Pet. Br. 29–30.

<sup>12</sup> Pet. Br. 16, n. 14 and 32 n. 42.

<sup>13</sup> *Amici Interstate Air Carriers (IAC)* alone try to argue to the contrary. Their position is that the limitation to property “subject to a property tax levy” was intended only to preserve State authority to have “traditional” exemptions, such as those for government-owned and church property. IAC  
(continued...)

therefore instead attempt to discount the importance of the congressional policy choice the decision reflects.<sup>14</sup> Primarily, they cast off that policy choice as irrelevant, on the theory that it is contained in the comparison class for subsection (b)(1) through (b)(3), which does not directly apply to subsection (b)(4). *E.g.*, Resp. Br. 20. That argument is disingenuous, for three reasons.

First, respondents’ position really is that the overall context and structure of the statute must be ignored, and that subsection (b)(4) must be read in isolation. Neither common sense nor precedent supports that artificial approach. *E.g.*, *United Savings Assn. v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365, 371 (1988) (“statutory construction . . . is a holistic endeavor.”) Second, if, as we maintain, Congress made a deliberate policy choice to preserve State authority to determine what is taxed and what is not, that fact critically undercuts respondents’ assertion that subsection (b)(4) can and should be used to bring claims of “exemption discrimination.” The non-specific language of

<sup>13</sup>(...continued)

Am. Br. 12. That same argument has been made unsuccessfully time and again in circuit courts. See generally Pet. Cert. 13–14 and Pet. Br. 26–27 (citing representative cases). It has been rejected for good reason.

First, if Congress intended such a limitation, it plainly did not write it into the statute; the language is unconditional. Second, the limitation to “commercial and industrial property” itself excludes the examples they cite. Third, there is nothing limiting, rather than merely illustrative, about the examples. Finally, the IAC ignores that the railroad industry expressly disavowed any intent to interfere with State exemption policies of *any kind*, and that the railroads themselves offered up a clarifying amendment to ensure that the statute would not interfere with State exemption authority. Pet. Br. 18–19 and n. 2.

<sup>14</sup> Beyond arguing that the comparison class is irrelevant, respondents assert only that the meaning of the “subject to a property tax levy” language is not an issue before the Court. Resp. Br. 21–22. To the contrary, our argument consistently has been that the comparison class excludes exempt property, that it does so for important policy reasons, and that subsection (b)(4) cannot be construed to nullify that congressional choice. Respondents’ unwillingness to meet that argument does not mean that it is not an issue in the case.



subsection (b)(4) properly cannot override the policies that Congress expressly sought to preserve elsewhere in the same statute. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). Third, respondents' argument ignores their own basis for an expansive reading of subsection (b)(4). They try to draw heavily on the history running from 1961–1972, a period that relates only to subsections (b)(1) through (b)(3), to characterize Congress as providing a complete and comprehensive solution to the problem of “discriminatory taxation.” If they want the benefit of that history, however, they must also take its burdens. That history reveals, just as the face of the statute makes plain, that Congress made a deliberate choice to protect State authority to exempt property from taxation without penalty in the form of lowered taxes for railroad property.

3. The question then must be whether Congress's focus and objective became radically more ambitious at some point during the final two years (1974–1976) of its deliberations. That is when, for the first time, Congress was urged to think about overtaxation of railroads as a consequence of some practice other than excessive assessments and rates. Respondents and their amici devote relatively little attention to the specific legislative history that surrounds the addition of subsection (b)(4) to the statute. What attention they give that history casts it in an inaccurate light.

The fourth subsection prohibiting “any other tax that discriminates” against a rail carrier first appeared in a 1974 version of the House legislation.<sup>15</sup> At that time, no substantive significance was attached to the added provision.<sup>16</sup> The language was then added to another House bill (H.R. 5385), which passed the full House. The house report that accompanied the bill expressly described the fourth subsection as “the so-called ‘in-lieu

<sup>15</sup> H.R. 12891, 93d Cong., 2d Sess. (1974).

<sup>16</sup> The first bill containing the fourth subsection was treated by all interested parties, including railroad representatives, as identical to a parallel house bill that had no “any other tax” provision in it. See Pet. Br. n 30.

tax” provision.<sup>17</sup> There was no debate or discussion of the fourth subsection on the House floor. The discussion of the section as a whole, however, confirms that after the addition of the “any other tax” subsection, Congress still intended to protect state exemption authority fully, and it still viewed the bill as a product of significant compromise.<sup>18</sup>

Railroad industry witnesses asked the Senate to add a fourth subsection addressed to “in lieu” taxes, and they specifically recommended that the Senate borrow the language that the House had used (“any other tax that discriminates” against a rail carrier).<sup>19</sup> The Senate added the language, in apparent response to those requests. The House and Senate bills went into conference committee containing effectively identical “any other tax” provisions. When the final bill emerged, the accompanying report explained that the committee had largely adopted the Senate version (a description that ran to the whole statute, rather than the “any other tax” provision); the final bill contained the “any other tax” language that had been common to both the House and Senate bills.<sup>20</sup>

<sup>17</sup> H.R. Rep. No. 1381, 93rd Cong., 2d Sess. 35–36 (1974).

<sup>18</sup> Floor discussions show that congressional members understood and intended that state authority to pursue economic and other objectives through tax exemptions would be wholly unaffected by this bill. See Pet. Br. 21, n. 27. The discussions also make clear that the bill was not a “cure-all” for the railroads, but instead was a product of significant compromise by all interested groups. Cong. Rec. H. 38733 (daily ed. Dec. 10, 1974) (“[This is] not a perfect piece of legislation because practically every party involved has found something wrong with it, but I claim that it is probably the best piece of legislation that can come out of Congress at this time \* \* \*”) (comments of Rep. Kuykendall).

<sup>19</sup> Steven Ailes, President of the AAR, and Stuart Johnson, counsel to the New York Dock Railway, made the request. See generally discussion in Pet. Br. 23; Am. Br. State of Washington, et al. 17–21; Am. Br. State of Iowa 9–11.

<sup>20</sup> The House bill prohibited: “The imposition of any other tax which results in discriminatory treatment of a carrier by railroad subject to this part.” H.R. Rep. No. 725, *supra*, at 19. The Senate bill prohibited: “The

(continued...)



Respondents do not dispute that the fourth subsection on the House side was understood to address "in lieu taxes," a phrase that this Court, drawing from that history, has described to mean "taxes applied in lieu of any other possible property tax." *Western Airlines, Inc., v. Board of Equalization*, 480 U.S. 123, 130-32 (1987). Respondents suggest, however, that the fourth subsection incorporated into the Senate bill was intended broadly to address any and all taxes and state taxing practices. They construct their entire claim on what they describe as a "characterization" contained in the conference report. Resp. Br. 22-23. That "characterization" is nothing more than a description of the Senate version of the bill using the literal language of the provision and a description of the House bill using the familiar "in lieu" short-hand.

Respondents' argument would require the Court, first, to accept the proposition that Congress intended the *identical* language used in both the House and Senate bills ("any other tax that discriminates") to have dramatically different meanings.<sup>21</sup> Next, the Court would have to believe that Congress would pick between those different meanings without comment, other than to note that it was adopting the Senate version of the statute as a

<sup>20</sup>(...continued)

imposition of any other tax which results in discriminatory treatment of a common or contract carrier subject to this part I, part II, part III, or part IV of this Act." S. Rep. No. 499, 94th Cong., 2d Sess. 232 (1975). The final version adopted by the Conference Committee prohibited: "The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." S. Rep. No. 595, 94th Cong., 2d Sess. 27 (1976).

<sup>21</sup> The Solicitor General agrees with respondents' view that the adoption of the language in the Senate bill represented a new and broader objective on Congress's part. But the Solicitor does so on the basis of an evident misunderstanding. The Solicitor asserts that although the House bill that went to Conference would have limited section (b)(4)'s application to "in lieu" taxes, the Conference Committee "expanded" the provision by selecting "broader" language from the Senate bill. U.S. Am. Br. (on the merits) at 13-14. Contrary to the Solicitor's suggestion, the pertinent language of the two bills was precisely the same.

whole.<sup>22</sup> Third, the Court would have to accept that Congress would communicate its choice between an all-encompassing purpose and one tailored to a more specific concern merely by describing one bill in terms that tracked the subsection's literal language, and describing the other bill with the short-hand terminology that had come to reflect the narrow meaning attached to the same literal language. Finally, the Court would have to believe that the States, after long and successful efforts to refine the bill, would stand by without comment, objection or dissent when this remarkable transformation took place.

The point is not necessarily to settle the question whether the "any other tax" provision is limited to in lieu taxes, or whether it extends to a broader range of non-property taxes (*e.g.*, payroll taxes, income taxes, etc.). It is enough to observe that the addition of that language did not mark, as respondents suggest, a new congressional objective to address "discrimination in all of its guises," rather than a finite set of concerns. Respondents' argument to the contrary turns completely on the limited and unenlightening notes in the conference committee report. Just as completely, it ignores the explicit and helpful history revealing the meaning of the language on the House side and the purpose in adding that same language to the Senate bill. Respondents' approach serves their argument, but not Congress's intent.

#### **B. State Exemption Policies Do Not Directly Or Uniquely Shift An Added Tax Burden To Non-Exempt Railroad Property.**

In our opening brief, we argued that the *per se* rule adopted by the Ninth Circuit cannot be correct given the congressional policy choices reflected in subsections (b)(1) through (b)(3). In

<sup>22</sup> The Senate bill in fact differed from the House bill in other respects. Significantly, the Senate bill was particularly straightforward in describing the comparison class for both rate and assessments claims through use of a single definition that required comparison properties to be "subject to a property tax levy." See Pet. Br. 24. The adoption of the Senate version of the bill served to ensure complete protection for State exemption policies, a fact which in and of itself refutes the purpose respondents try to attribute to Congress's selection of the Senate version.

those subsections, Congress expressly protected state authority to exempt property from taxation without giving railroads the benefit of those exemption policies. To conclude, as the Ninth Circuit does, that “any exemption not also available to railroads violates the statute” runs head-long into that clear policy choice. Pet. Cert. App-16 (emphasis original).

Neither respondents nor their amici make any effort to defend the Ninth Circuit’s *per se* analysis. Instead, they claim that state property tax exemptions, while perhaps not inherently discriminatory against railroads, take on a forbidden quality when the percentage of exempted property becomes excessive (presumably a majority or more, although respondents decline to be specific).<sup>23</sup> Railroads, they submit, are then forced to bear the burden of replacing revenues lost by tax exemptions that are granted to other personal property owners. Moreover, because railroads represent a minority class of non-resident property owners, railroads are politically powerless to prevent this shift in the tax burden. Respondents argue that the additional tax burden, combined with their political weakness, falls squarely within Congress’s broad remedial objective. Not to construe the statute to reach “excessive exemptions” would, respondents and their amici argue, be “absurd,” for States would be free to achieve in a new way the very “discrimination” Congress set out to eliminate.

1. Respondents’ “absurdity” claim depends entirely on their flawed premise that Congress sought to eliminate “discrimination in all of its guises.” To decline to entertain claims of “exemption discrimination” might at least be arguably “absurd” if, as respondents claim, Congress intended the statute to solve all problems of excessive taxation that might ever arise. On the other hand, if Congress intended only to address the particular complaints that the railroads presented, and to consider others “as

<sup>23</sup> Respondents argue that a State’s exemptions should be deemed “discriminatory” at the point at which railroads do not have tax equality with “the general mass of business personal property.” Resp. Br. at 23.

they become more urgent” (*ante* at p. 5), then limiting the statute’s reach to the problems Congress had before it is not absurd at all. There is nothing irrational, illogical or nonsensical about approaching problems one at a time, as their nature and dimensions become known, and as the interests of all affected parties can be identified, debated and balanced. Cf. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1954) (“[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”)

2. Fundamentally, respondents’ argument turns on the unstated assumption that overtaxation caused by excessive rates, assessments and in lieu taxes can be equated with “excessive” levels of exemptions. That argument assumes too much and proves too little. When a State singles out railroad property for high assessments or rates, railroads suffer a unique, direct and measurable burden. No negative consequences flow to any other taxpayer; to the contrary, other taxpayers may realize an incremental benefit in the form of a slightly reduced tax burden. No other taxpayers have incentive to complain, which leaves railroads with little political clout to correct the problem. In short, uniquely high assessments or rates are disfavorable treatment directed specifically and measurably to railroad property.

The same is not true of exemptions. Typically, the tax dollars not collected because certain categories of property are tax-exempt result in an added burden for all other property taxpayers. Because that burden is shifted on equal terms to the remaining property taxpayers, it is significantly diluted. How much any one taxpayer feels the transferred burden, or how politically powerful or powerless the remaining taxpayers are to do anything about it, depends on the size of the pool of taxpayers left to bear the taxes. Exempting property from taxation thus affects railroads altogether differently than levying inflated taxes directly on property that the railroads own.

This case demonstrates the fallacy of equating the impact of a State’s exemption policies with the impact of overtaxation through excessive assessments and rates. With mesmerizing



frequency, respondents invoke their claim that 67 percent of "business personal property" is exempt, leaving railroad personal property among the 33 percent that is not. Their argument is designed to suggest (although respondents do not directly assert) that the owners of the remaining 33 percent of *business personal* property must absorb the taxes lost due to the exemptions. They are thus forced to engage in a collateral debate about whether their property should be compared only to other business personal property or to other business personal and real property combined. If they cannot limit the comparison to personal property, they cannot claim to be in a taxed minority, and they fail their own test. As a matter of plain language and statutory intent, they are simply wrong; Congress, in the rate and assessment provisions, did not require railroad personal property to be compared only to other business personal property, or railroad real property to be compared only to other business real property.<sup>24</sup> But more to the point, in determining whether a State has

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<sup>24</sup> The express language of subsection (a)(4) requires comparison only to "property" without distinction or, in the original codification, to "all property, real or personal." The report on which respondents rely states only that Congress did not intend to prohibit states from applying different rates or assessments to real and personal property. See S. Rep. No. 1483, 90th Cong., 2d Sess. 10-11 (1968). States were concerned that the language would permit railroads to mix the comparison by comparing real property to personal, or personal to real, in those States that distinguish between the two for purposes of rates and assessments. No concern was ever expressed about a combined comparison class in those States that, like Oregon, use uniform rates and assessments for the two categories. The AAR offered an amendment that would expressly have required a comparison of railroad real property only to other real property, railroad personal property only to other property, and so on. Congress declined to adopt it. *Hearings on S. 2362 [and related bills] Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 296-97 (1971, 1972). See also, *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 102 (1969) (amendment requiring comparison of railroad personal property to other business personal property not adopted). Whatever else this history means, it cannot be understood to force a fractured comparison in those States that do not distinguish real and personal property for purposes of rates and assessments.

"discriminated" against railroads by giving tax exemptions to others, respondents' artificial comparison is meaningless.

Although we disagree with respondents' percentages and numbers (as did both lower courts), the claim that Oregon exempts 67 percent of all *business personal* property is, in and of itself, completely unhelpful in determining what disadvantage flows to railroads or to any other taxpayer. In Oregon, real and personal property tax dollars all go into a single revenue pool, so that the additional tax burden caused by the exemption of any category of property shifts to all remaining taxpayers. To whatever extent railroads in Oregon bear higher taxes because of the amount of *business personal* property that is tax-exempt, the increase is necessarily fractional, for it is distributed to the remaining property taxpayers, irrespective of the type of property they own. Respondents' hand-crafted comparison class is designed to create the illusion that the owners of the 33 percent of taxed *business personal* property must bear the tax burden shifted from the owners of exempt *business personal* property. If the universe of taxpayers left to bear the burden in fact were that small, taxes on non-exempt property would triple, and the taxpayers left to bear the burden might be reduced to a politically weak subgroup.

Respondents' picture is, however, wholly inaccurate. For the tax year in question, respondents incurred an approximate 11.5 percent increase in their taxes because of the amount of business personal property that paid no taxes.<sup>25</sup> The increase was not transferred to taxed railroad property alone, or as part of a small and insular group of taxpayers; rather, *all* other owners of taxed property (real and personal, commercial and non-commercial

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<sup>25</sup> In 1988, Oregon's entire taxable property base was \$84.2 billion. Oregon Blue Book, 205 (1989-90). If the State had taxed the exempt property of which respondents complain, the total tax base would have been \$93.9 billion. ( $84.2 + 9.7 = 93.9$ ). Thus, a property tax base of \$84.2 billion dollars was required to absorb the burden that would otherwise have been borne by a tax base of \$93.9 billion. Eliminating \$9.7 billion from the tax base, therefore, increased the burden on the remaining taxed property by 11.5 percent. ( $\$84.2 \text{ billion} \times 1.115 = \$93.9 \text{ billion}$ ).



alike) incurred the same 11.5 percent increase. Oregon's tax exemption policies, therefore, do not deprive railroads of an "essential political check," as respondents claim. Resp. Br. 28. Nor do they run afoul of Congress's primary objective of maintaining equalized taxes on railroad property.

As a result, it cannot be assumed that Congress would have considered "exemptions" to be "discriminatory" at all. Congress, it is worth remembering, did not set out to protect railroads from taxation, only from taxation that is *uniquely* burdensome and therefore discriminatory. Exemption policies increase taxes for railroads, but not uniquely or unequally. Rather, the burden shifts to other taxpayers in general, so that railroads absorb the burden in combination with all other property taxpayers in the State. Their fate, therefore, remains "tied to the fate of a large and local group of taxpayers."<sup>26</sup> In short, favoring other taxpayers does not translate necessarily or directly into uniquely disfavoring railroads, and lacks the "discriminatory" features of the State overtaxation practices that motivated Congress to enact the statute.

3. Because the impacts of overtaxation and exemption policies are not the same, fears that States will excessively exempt property in an effort to discriminate against railroads are purely fanciful. Respondents try to refute that point by citing a small handful of lower court cases that, in their view, prove that this evil will come to pass. Some of those cases demonstrate other problems with State exemption policies that might be independently subject to direct attack under traditional Commerce Clause standards.<sup>27</sup> Beyond that, those cases merely demonstrate that lower courts have succumbed to the illusion that "excessive

<sup>26</sup> *Kansas City Southern Ry. Co. v. McNamara*, 875 F.2d 368, 375 (5th Cir. 1987).

<sup>27</sup> For example, in *Ogilvie v. State Board of Equalization*, *supra* and *Burlington Northern Railroad Company v. Bair*, 766 F.2d 122 (8th Cir. 1985), the effect of the States' tax structure was to tax property owned by railroads *because* it was owned by railroads, and to leave the same type of property tax-free if owned by other entities.

exemptions" translate into direct overtaxation of railroads.<sup>28</sup> None of them supports respondents' and their amici's vision of a system in which railroads are left to bear the entire tax burden while all other property owners remain tax free.<sup>29</sup>

4. The difference between the impact of exemptions and that of direct overtaxation highlights another flaw in respondents' position. The remedies Congress designed for excessive rates and assessments are designed to put railroads in the position they would have been in if the State had not engaged in the prohibited overtaxation in the first instance. *See* Pet. Br. 41-45.<sup>30</sup> If the Court concludes that Oregon "discriminates" against railroads as

<sup>28</sup> *E.g.*, *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988) *cert. denied*, 464 U.S. 846 (1989).

<sup>29</sup> There is another answer to respondents' fear. Their hypothetical assumes a tax system in which only a few limited categories of property are taxed, and all other property is tax-exempt. That description, of course, is not true of Oregon's system. No one disputes, nor can they, that in Oregon numerous categories of business personal property are taxed, and a vast number of taxpayers are subject to that tax. What respondents really posit is a tax structure that no longer represents a general *ad valorem* property tax system. If Oregon were to structure its tax laws so that only narrow categories of property were taxed and all other property were exempt, the answer might well be that such a tax on railroads would qualify as an "in lieu" tax fully subject to examination under subsection (b)(4). *See, e.g.*, *Western Airlines v. Board of Equalization*, 480 U.S. 123 (1987). Oregon has not done so, however.

<sup>30</sup> The U.S. Solicitor General generally agrees with Oregon that the remedy, if any, should be proportional. We differ where the Solicitor suggests that, in determining what exempt property should be used to reduce the railroads' taxes, the inquiry may turn on whether the owners of that property are required to pay other taxes. U.S. Am. Br. 21-22. In effect, the Solicitor rewrites the comparison class in subsection (a)(4) to exclude only property "not subject to a property tax levy, but subject to equivalent alternative taxation." A State could not, if we understand the Solicitor's position correctly, have wholly tax-exempt property without *per se* entitling the railroads to relief. That position differs little from the Ninth Circuit test the Solicitor purports to reject. The Solicitor may be seeking to strike a new compromise between the interests of the States' and the railroads, but that approach is patently at odds with the plain language of the statute, its history and the compromise Congress endorsed.

a consequence of excessive exemptions, the remedy should be the same — *i.e.*, to tax railroads as if the “discriminatory” practice had not occurred. Their claim is that Oregon discriminates against them because the value of the property exempted unfairly shifts to them a tax burden that they are politically powerless to deflect. As we have already discussed, Oregon’s policy of exempting \$9.7 billion worth of other business personal property has the effect of increasing respondents’ taxes approximately 11.5 percent. If they are entitled to any relief at all on the basis of their theory, it should be to remove the added burden, not to remove the obligation to pay any taxes whatsoever.<sup>31</sup>

### C. Respondents’ Arguments To Limit State Exemption Authority Belong In Congress.

There are answers to all of respondents’ arguments. Some are provided by the text and context of the plain language of subsection (b)(4); others are in legislative history that respondents decline to acknowledge; still others are provided by common sense and a practical understanding of the difference between overtaxation of railroads and exemption of others.

When the dust settles, however, respondents’ arguments reveal their weaknesses more by the points they do not make than by the points they do. Respondents do not deny that ambiguity in the early legislation caused the States to be concerned that federal courts might interfere with their ability to pursue local goals through tax exemption policies. They do not deny that congressional members repeatedly, and without dissent, expressed sympathy for those concerns. They do not deny that, as sponsors of the legislation, the railroad industry itself neither voiced objection to State exemption policies nor complained that States might abuse their exemption authority if Congress did not limit it. Respondents do not deny that the railroad industry itself never resisted clarifying the bill to meet the States’ concerns, or that railroads directly offered up an amendment for that purpose.

<sup>31</sup> If the Court determines some remedy is owing, it appropriately should remand the case to the lower courts to determine the exact amount of reduced taxation that should be ordered.

They do not deny that the “then-most-prevalent”<sup>32</sup> problem of direct overtaxation was the only complaint that the railroad industry ever brought to Congress’s attention.

Respondents’ real claim is that circumstances have changed, and the Court should construe the statute to meet them. In their effort to have the Court fill a void they believe Congress inappropriately left in the statute, they are preempting a debate that should take place, if at all, in Congress. *See, e.g., Helvering v. Ohio Leather Co.*, 317 U.S. 102, 110 (1942) (“[A]rguments urging the broadening of a tax deduction statute beyond its plain meaning to avoid harsh results are more properly addressed to Congress than to the courts.”) The parties could argue long and hard whether railroads should have the benefit of policies that States extend to property such as business inventory and standing timber. We could debate at length whether it should matter that the exemptions are available on the same terms to railroads, so that business inventory in their hands is fully exempt. We could argue at further length whether those policies, if legitimate when the inventory is small or the timber is less valuable, suddenly become illegitimate when their value rises to a certain level. And we could debate whether the tax burden shifted to a railroad by a State’s system of exemptions for non-railroad property is “discriminatory” in any sense that should concern Congress. Finally, the parties could each make their case for whether railroads should be relieved of any obligation to pay taxes, or whether some other relief is more in keeping with an “exemption discrimination” claim.

The essential point is not who would win or lose the debate, or what middle ground could be found between the parties’ positions. The point is that the debate has never occurred. As we argued in our opening brief (Pet. Br. 33), the States must look to the political process for protection of sensitive interests such as their taxing authority, and that process, complete with its compromises and limitations, must be respected. *See generally*

<sup>32</sup> AAR Am. Br. 9.

*Garcia v. San Antonio Metropolitan Transit District*, 469 U.S. 528, 550-52 (1984). If the railroad industry believes that Congress's policy was short-sighted and that some other policy should be in place, Congress, not this Court, is the appropriate forum for that argument.

**CONCLUSION**

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
PETITIONER

v.

ACF INDUSTRIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### QUESTIONS PRESENTED

1. Whether the Oregon ad valorem property tax discriminates against rail carriers, in violation of 49 U.S.C. 11503(b)(4), by exempting various types of commercial and industrial property other than railroad cars from the tax.

2. Whether, if the state tax violates 49 U.S.C. 11503(b)(4), the appropriate remedy is to exempt railroad cars from the tax.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-74

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
PETITIONER

v.

ACF INDUSTRIES, INC., ET AL.

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**INTEREST OF THE UNITED STATES**

This case concerns Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (the 4-R Act). The United States has an interest in the proper application of this statute to preclude the imposition of discriminatory taxes on railroad property. At the Court's invitation, the United States filed a brief *amicus curiae* at the petition stage of this case.

**STATUTORY PROVISIONS INVOLVED**

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54, as originally codified at 49 U.S.C. 26c (1976) and as recodified in 1978 at 49 U.S.C. 11503 by the Revised Interstate Commerce Act, Pub. L. No. 95-473, § 1, 92 Stat. 1445, is reproduced at Pet. App. 35a-41a.

**STATEMENT**

1. The 4-R Act was enacted to improve the operations, structure, physical facilities, and financial stability of the



railway system of the United States. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 of that Act furthers "the goal of \* \* \* railroad financial stability" by establishing "a prohibition on discriminatory state taxation of railroad property." 481 U.S. at 457. See also *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 207 (8th Cir.), cert. denied, 454 U.S. 1086 (1981).<sup>1</sup> As recodified at 49 U.S.C. 11503,<sup>2</sup> Section 11503(b) declares that "[t]he following acts unreasonably burden and discriminate against interstate commerce" and provides that the States and their subdivisions "may not do any of them" (49 U.S.C. 11503(b)):

(i) *Subsection (b)(1)*: the assessment of "rail transportation property"<sup>3</sup> at a higher ratio of its true

<sup>1</sup> As this Court stated in *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)):

The legislative history of the antidiscrimination provision in the 4-R Act demonstrates Congress' awareness that interstate carriers "are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.

Congress concluded in 1975 that, as the result of discriminatory state taxation, "railroads are over-taxed by at least \$50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

<sup>2</sup> As this Court observed in *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), although the statutory language of Section 306 was slightly altered upon its recodification in 1978, the Revised Interstate Commerce Act provides that the change in statutory language "may not be construed as making a substantive change in the laws replaced" (481 U.S. at 457 n.1, quoting Section 3(a) of the Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1466). In this brief, for the reasons explained in *Kansas City Southern Ry. v. McNamara*, 817 F.2d 368, 370 n.2 (5th Cir. 1987), we will ordinarily refer to the current codification in describing the statute. Subsections (b)(1) through (b)(4) of the current codification correspond to Sections 306(1)(a) through 306(1)(d) of the 4-R Act (90 Stat. 54). 49 U.S.C. 11503.

<sup>3</sup> The term "rail transportation property" is defined to mean property "owned or used" by railroads. 49 U.S.C. 11503(a)(3).

market value than "other commercial and industrial property"<sup>4</sup> is assessed in the same jurisdiction (49 U.S.C. 11503(b)(1), derived from Section 306(1)(a) of the 4-R Act);<sup>5</sup>

(ii) *Subsection (b)(2)*: the imposition of a tax based on such an improper assessment ratio (49 U.S.C. 11502(b)(2), derived from Section 306(1)(b) of the 4-R Act);

(iii) *Subsection (b)(3)*: the imposition of an ad valorem property tax on "rail transportation property" at a tax rate higher than the rate applicable to "commercial and industrial property" in the same jurisdiction (49 U.S.C. 11503(b)(3), derived from Section 306(1)(c) of the 4-R Act); and

(iv) *Subsection (b)(4)*: the imposition of "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4), derived from Section 306(1)(d) of the 4-R Act).<sup>6</sup>

2. Oregon imposes an ad valorem tax on real and personal property located within the State (Pet. App. 5a). Various classes of personal property—such as agricultural machinery and equipment, business inventories, livestock, poultry, bees, and agricultural products in the possession of farmers—are exempt from the State's tax (Or. Rev.

<sup>4</sup> The term "commercial and industrial property" is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. 11503(a)(4).

<sup>5</sup> The Act, however, contains an exception that allows the States to assess railroad property at a percentage of its true market value that is as much as 5% greater than the percentage that is applied to non-railroad property. This exception is contained in the provisions that authorize the federal courts to enjoin state violations of the Act. See 49 U.S.C. 11503(c).

<sup>6</sup> As originally enacted, Section 306(1)(d) of the 4-R Act proscribed "any other tax which results in discriminatory treatment of a common carrier by railroad" (Pet. App. 39a). In its recodification as Subsection (b)(4), the language was revised to proscribe "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

Stat. Ann. §§ 307.325, 307.400 (1992)). Some classes of personal property—such as motor vehicles—are exempt from the personal property tax but are subject to registration or other fees in lieu of the property tax (*id.* § 803.585 (1989)).<sup>7</sup> Railroad cars are classified as personal property and are not exempt from the State's tax (Pet. App. 5a).

Respondents are engaged in the business of leasing railroad cars to shippers and railroads (Pet. App. 22a).<sup>8</sup> Respondents filed this action in federal district court, seeking declaratory and injunctive relief against the assessment and collection of Oregon's personal property tax with respect to their railroad cars. Respondents claimed that, because of the exemptions available for various types of non-railroad commercial property, the state tax violates the prohibition of Subsection (b)(4) against "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

As a threshold question, the district court considered whether respondents had standing to raise a claim under this statute (Pet. App. 25a-28a). Respondents are car rental companies and are not themselves "rail carriers." Respondents contended, however, that a tax that discriminates against rail cars necessarily results in discrimination against rail carriers (*id.* at 25a).<sup>9</sup> The court held that, "given the undisputed close connections between [respondents] and the railroad industry," the link between discriminatory treatment of rail cars and rail carriers is suffi-

<sup>7</sup> Similarly, various classes of real property—such as standing timber—are exempt from the ad valorem real property tax and are, instead, taxed upon production or severance under a different tax scheme (see Or. Rev. Stat. Ann. § 321.272 (1993)).

<sup>8</sup> Some of respondents lease nearly all of their cars to shippers; others lease nearly all of their cars to railroads; others lease significant numbers of cars to both (Pet. App. 22a).

<sup>9</sup> The court noted that such an argument, pressed to its extreme, "could produce absurd results" (Pet. App. 27a). As the court stated, "[i]f any company that furnishes products to the railroad industry asserted standing under [Subsection (b)(4)], there would be almost no limit to standing" (Pet. App. 27a).

ciently clear that respondents have standing to challenge the tax under Subsection (b)(4) (Pet. App. 27a-28a).

On the merits, the district court held that the state tax does not violate the nondiscrimination requirements of Subsection (b)(4). The court first noted (Pet. App. 28a) that Oregon assessed railroad property at the same percentage of its true market value as it assessed the other types of commercial property subject to tax, and thus did not violate Subsection (b)(1) or (b)(2). Oregon also did not apply a different tax rate in taxing railroad property than it applied in taxing non-railroad property, and thus did not violate Subsection (b)(3). See Pet. App. 28a.<sup>10</sup>

The court then addressed whether the State's scheme of tax exemptions discriminates against railroads in violation of Subsection (b)(4). The court noted that state property taxes that exempted more than 50% of non-railroad commercial property had been found to be impermissibly discriminatory under Subsection (b)(4) (Pet. App. 32a, citing *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989), and *Burlington Northern R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985)). The court stated that, by contrast, the Oregon exemptions protected only about 30% of non-railroad commercial property from the state tax (Pet. App. 32a). The court concluded that, even if "there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here" (*ibid.*).

<sup>10</sup> Under Subsections (b)(1) and (b)(3), only other property that is "subject to" property tax may be considered in determining whether an improper assessment ratio or tax rate is being applied to railroad property. See 49 U.S.C. 11503(a)(4); note 4, *supra*. While different assessment ratios and tax rates for railroad and non-railroad property would violate Subsections (b)(1) and (b)(3) (but see note 5, *supra*), the complete exemption of non-railroad property from tax does not violate those subsections because exempt property is not "subject to" tax and therefore does not fall within the statutory definition of "commercial and industrial property." See, e.g., *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1571, 1573 (11th Cir. 1987); notes 15, 24, *infra*.



3. The court of appeals reversed (Pet. App. 1a-19a). The court first held that respondents have standing to challenge the tax under Subsection (b)(4) because the statute "prohibits any tax that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect" (Pet. App. 7a n.2). See note 6, *supra*. The court noted that the State had "apparently abandoned" this issue on appeal (*ibid.*).<sup>11</sup>

On the merits, the court of appeals disagreed with the district court's conclusion that the exemption of a sizable percentage of non-railroad property under the State's tax scheme is permissible under Subsection (b)(4). In the court's view, "[t]he most natural reading" of the statute is that it "is violated by *any* exemption given to other taxpayers but not to railroads" (Pet. App. 16a). The court stated that, under the calculation most generous to the State, 25% of non-railroad commercial property is exempt from property tax (*id.* at 18a). The court held that that level of discrimination "far exceeds any possible *de minimis* exception" to Subsection (b)(4) and thus violates the nondiscrimination requirement of the statute (Pet. App. 19a).

In reaching that conclusion, the court of appeals rejected the State's claim that Subsection (b)(4) does not apply to ad valorem property taxes. The State argued that, since Subsections (b)(1) through (b)(3) establish specific rules for property taxes, and since Subsection (b)(4) by its terms proscribes discrimination resulting from "any other tax" (or, in the recodified version of the statute, "another tax"), the "other tax" referred to in Subsection (b)(4) must be a tax "other" than a property tax. The court rejected that claim because, as several

<sup>11</sup> Petitioner confirms that it no longer challenges respondents' standing under Subsection (b)(4). The petition states that the question of standing "may be considered settled for purposes of review at this level" (Pet. 5 n.5). Petitioner thus now concedes that, if the State's tax would violate Subsection (b)(4) with respect to rail cars owned by a rail carrier, the State's tax would likewise violate Subsection (b)(4) with respect to the rail cars owned by respondents.

other courts have held,<sup>12</sup> Subsections (b)(1) through (b)(3) do not address taxes that are discriminatory because of undue exemptions; by contrast, Subsection (b)(4) was enacted "to prevent tax discrimination \* \* \* in *any form whatsoever*" (Pet. App. 12a, quoting *Ogilvie v. State Board of Equalization*, 657 F.2d at 210). Even though exemptions of non-railroad property are excluded from consideration in applying the per se rules of Subsections (b)(1) through (b)(3) to determine whether an improper assessment ratio or tax rate has been applied by the State (see note 10, *supra*), the court held (Pet. App. 12a-13a) that the existence of such exemptions is relevant in evaluating whether the state tax "discriminates against a rail carrier" in violation of Subsection (b)(4).

The court then addressed the proper remedy for the State's violation of Subsection (b)(4). The court rejected the State's view that respondents "are only entitled to an exemption for the percentage of their property corresponding to the percentage of all non-railroad property that is exempt" (Pet. App. 19a). The court held that respondents "were entitled to the same total exemption preferred property owners enjoyed" and directed the district court, on remand, to enjoin the State from collecting any portion of its tax on respondents' railroad property (*ibid.*).

#### SUMMARY OF ARGUMENT

1. Section 306 of the 4-R Act was enacted to end the long history of discriminatory state taxation of rail carriers and railroad property. Subsections (b)(1) through (b)(3) proscribe state property taxes that fail to apply equal assessment ratios and equal tax rates to railroad property and other commercial and industrial property. Subsection (b)(4) then generally prohibits the States from imposing "another tax that discriminates against a

<sup>12</sup> See *Department of Revenue v. Trailer Train Co.*, 830 F.2d at 1573; *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983); *Ogilvie v. State Board of Equalization*, 657 F.2d at 209-210. See also *Burlington Northern R.R. v. Bair*, 766 F.2d at 1224; *Trailer Train Co. v. Leuenberger*, 885 F.2d at 416-417.



rail carrier." The latter provision was enacted as a "catch all" to proscribe state tax discrimination "in all of its guises" (*Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), cert. denied, 465 U.S. 1100 (1984)). It applies to discrimination implemented through property tax exemptions of non-railroad property as well as to other types of discriminatory state tax practices. Any other interpretation of the statute would require the assumption that Congress enacted an illogical and self-defeating scheme under which the States could discriminate against railroad property by the simple artifice of exempting all other types of property from the property tax base.

2. The court of appeals erred, however, in concluding that *any* state tax that affords different treatment to railroad property and some classes of non-railroad property necessarily violates Subsection (b)(4). The statute proscribes "discrimination" not "differentiation." A state tax that treats railroad and non-railroad property differently "discriminates against a rail carrier" only if the State cannot justify the differences in treatment. In this case, neither the district court nor the court of appeals considered whether the State of Oregon possesses valid justifications for the property tax exemptions that respondents have challenged. The case should be remanded for consideration of that issue in the first instance by the lower courts.

3. If, on remand, it is determined that some or all of the exemptions granted by the State lack justification and result in discrimination against rail carriers, the proper remedy is to exempt an equivalent percentage of railroad property from the State's tax. The remedy should place rail carriers in a position equivalent to that of the general mass of other commercial and industrial property in the State. A remedy thus tailored prevents the State from shifting a disproportionate share of its tax burden to railroads but does not deny the State all power to employ exemptions to implement state tax policies. The remedy adopted by the court of appeals—requiring a complete exemption of railroad property from the State's tax—is

not consistent with the substantive or remedial scheme that Congress adopted.

## ARGUMENT

### I. SUBSECTION (b)(4) PROHIBITS STATES FROM IMPOSING ANY TAX, INCLUDING AN AD VALOREM PROPERTY TAX, THAT DISCRIMINATES AGAINST RAIL CARRIERS

"It is a fact widely known, recognized by Congress, and not contested here by the parties that property taxation by the several states has, for many years, operated in a fashion inherently discriminatory against the railroads." *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 (4th Cir. 1983). Section 306 of the 4-R Act was enacted in 1976 "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of \* \* \* transportation property" and to end "the discriminatory tax practices weakening our national transportation system" (S. Rep. No. 630, 91st Cong., 1st Sess. 1, 3 (1969)).<sup>13</sup>

Section 306 contains a four-part prohibition against discriminatory state taxation of railroads. The first three prohibitions (Subsections (b)(1) through (b)(3)) prevent the States from employing higher assessment or tax rates in taxing "rail transportation property" than in taxing "other commercial and industrial property" (49 U.S.C. 11503(b)(1)-(3)). The fourth prohibition (Subsection (b)(4)) prevents the States from imposing "another tax" (or, in the original phrasing of the statute, "any other tax") that "discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

<sup>13</sup> Before Section 306 was enacted, Congress considered several similar proposals to bar discriminatory taxation of rail carriers. See, e.g., S. Rep. No. 445, 87th Cong., 1st Sess. 465 (1961); S. Rep. No. 1483, 90th Cong., 2d Sess. 9 (1968); S. Rep. No. 630, *supra*, at 10; S. Rep. No. 1085, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 725, *supra*, at 78. The courts of appeals properly have considered the reports concerning these related proposals in determining Congress's intent in enacting Section 306. See, e.g., *Arizona v. Atchison, T. & S.F. R.R.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981).

The threshold question in this case is whether a state-granted property tax exemption for non-railroad property falls within the scope of any of these four non-discrimination requirements. Under the definitional provisions of the statute, the first three prohibitions (relating to improper assessment ratios and tax rates) require equal treatment only between railroad property and other "commercial and industrial property" that is "subject to a property tax levy" (49 U.S.C. 11503(a)(4)). Because Subsections (b)(1) through (b)(3) require equivalent tax treatment only for property that is "subject to" tax, the courts have consistently held that *exemptions* of non-railroad property from a state tax cannot violate those provisions. Exempt property is not "subject to tax," and the existence of exemptions is therefore irrelevant in applying the objective "equal assessment" and "equal tax rate" requirements of the first three subsections of the statute. *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986); note 10, *supra*.<sup>14</sup>

<sup>14</sup> The conclusion that Subsections (b)(1) through (b)(3) have no application to property tax exemptions is not challenged by respondents. The issue was not addressed by the parties below and is not presented as a question for review in this Court.

In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987), this Court noted probable jurisdiction of an appeal that raised the question whether the analogous statutory definition in the Airport and Airway Improvement Act of 1982 of commercial and industrial property "subject to" tax (49 U.S.C. App. 1513 (d)(1)) omits or includes property exempt from the tax. See 480 U.S. at 127-129. The Court found it unnecessary to resolve that question in *Western Air Lines* because a different provision of that Act, which has no parallel in the 4-R Act, required the conclusion that the state tax was valid without regard to the correct meaning of that provision. See 480 U.S. at 129-134.

Both before and after the Court declined to reach this issue in *Western Air Lines*, other courts have consistently held that exempt property is not "subject to" tax and that Subsections (b)(1) through (b)(3) of Section 306 of the 4-R Act therefore have no application to property tax exemptions. See Pet. App. 8a; note 10, *supra*. But cf. *Northwest Airlines, Inc. v. State Board of Equalization*, 358 N.W.2d 515 (N.D. 1984). Congress expressly contemplated that the States would not be precluded by Subsections (b)(1) through (b)(3) from exempting some types of property from tax

The potentially discriminatory effect of property tax exemptions for non-railroad property therefore must be evaluated (if at all) under the standards of Subsection (b)(4), which proscribes "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)). The court of appeals correctly held in this case (Pet. App. 12a) that, under Subsection (b)(4), the States are precluded from employing property tax exemptions in a manner that results in discrimination against rail carriers.<sup>15</sup> This interpretation of Subsection (b)(4) is the "interpretation which can most fairly be said to be [e]mbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested" (*FBI v. Abramson*, 456 U.S. 615, 625 n.7 (1982), quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

1. To end tax discrimination against rail carriers, Congress specifically forbade the States from imposing an assessment ratio or tax rate for railroad property that exceeds the assessment ratio or tax rate applicable for "other commercial or industrial property" (49 U.S.C. 11503(b)(1)-(3)). Petitioner contends that these objective limitations in Subsections (b)(1) through (b)(3) exhausted Congress's concerns with discriminatory state property taxes and that the prohibition of "another tax" that discriminates against rail carriers in Subsection (b)(4) must be understood to refer only to a tax "other

(see S. Rep. No. 630, *supra*, at 11). The statute itself exempts "land used primarily for agricultural purposes or timber growing" from the comparison class for evaluating discriminatory assessment ratios and tax rates under Subsections (b)(1) through (b)(3). See 49 U.S.C. 11503(a)(4); note 24, *infra*.

<sup>15</sup> The other courts of appeals have consistently reached this same conclusion. See note 12, *supra*. In *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 336 S.E.2d 896, 897 (1985), however, the Supreme Court of Virginia held (without extended discussion or analysis) that Subsection (b)(4) "does not refer to *ad valorem* property taxes at all, but rather refers to other or different schemes of taxation not contemplated by the first three subparagraphs."



than" a property tax. The language, purpose and history of the statute are inconsistent with petitioner's claim.

Subsections (b)(1) through (b)(3) contain objective tests proscribing certain types of unequal tax treatment of "railroad property." Subsection (b)(4) contains a general prohibition of "another tax" which "discriminates" against rail carriers. Both the nature of the prohibition ("discrimination") and the description of the protected class ("rail carriers") is broader and more general in the latter provision than in the former. The broad language of Subsection (b)(4) reflects that it was enacted as a "catch-all" provision to reach discriminatory state taxation "in all of its guises."<sup>26</sup> *Southern Ry. v. State Board of Equalization*, 715 F.2d at 528. As explained by the Eleventh Circuit:

Following three subparagraphs \* \* \* dealing with taxation of "transportation property," [Subsection (b)(4)] then forbids "the imposition of any other tax which results in discriminatory treatment of a common carrier by railroad." Without invoking any of the ordinary rules of construction, it would appear that [Subsection (b)(4)] is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means.

*Alabama Great Southern R.R. v. Egerton*, 663 F.2d 1036, 1040 (11th Cir. 1981). See also *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d at 379. Thus, in the statute's broad design, Subsection (b)(4)

<sup>26</sup> Senate Bill 927, proposed in 1967, included language similar to the language now codified in Subsections (b)(1) through (b)(3). 4 *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 1-2 (1967). Language similar to Subsection (b)(4) was first presented in H.R. 12891, in 1974. 16 *Hearings Before the House Committee on Interstate and Foreign Commerce and the Subcommittee on Transportation and Aeronautics*, 93d Cong., 2d Sess. 24 (1974). As the Fourth Circuit has noted, "nothing in the committee reports, debates, or other legislative history focuses specifically on the purpose of [Subsection (b)(4)]" (*Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (1985)).

prohibits tax discrimination against "rail carriers" in any form and by any method. See, e.g., *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991) (occupation tax); *Department of Revenue v. Trailer Train Co.*, 830 F.2d at 1573 (property tax exemptions); *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 372-373 (gross receipts tax); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d at 376 (income taxes); *Ogilvie v. State Board of Equalization*, 657 F.2d at 209-210 (property tax exemptions).

Congress was, of course, aware that the States had long discriminated against rail carriers through application of general property tax regimes in the manner now proscribed in Subsections (b)(1) through (b)(3). Congress also recognized that there were other ways in which state taxes could discriminate against, and unreasonably burden, interstate commerce. Rather than attempting the impractical task of anticipating every tax scheme that could result in unjust discrimination against rail carriers, Congress employed the broad prohibition against discrimination in Subsection (b)(4) to account for the "unforeseeable" (*Diamond v. Chakrabarty*, 447 U.S. 303, 316 (1980)). Cf. *United States v. Pennsylvania R.R.*, 323 U.S. 612, 616 (1945) (although "Congress has specified with precise language some obligations[.] \* \* \* [t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms"); *United States v. Baltimore & O. R.R.*, 333 U.S. 169, 175 (1948).

The history of Subsection (b)(4) supports the conclusion that the statute is designed to proscribe all forms of discriminatory state taxation. The House bill from which Subsection (b)(4) is derived would have limited this provision to discriminatory "in lieu" taxes imposed as an alternative to ad valorem property taxes. H.R. Conf. Rep. No. 768, 94th Cong., 1st Sess. 139 (1975); H.R. Rep. No. 725, *supra*, at 77. In the conference agreement, the provision was expanded to proscribe discrimination under "any other tax." S. Conf. Rep. No. 595, 94th Cong., 2d



Sess. 165-166 (1976). In selecting this broader statutory language, Congress sought to proscribe all forms and methods of state taxation that "result[] in discriminatory treatment" of rail carriers (Pet. App. 39a).<sup>17</sup>

2. If Subsection (b)(4) were interpreted to apply only to taxes *other than* property taxes, the statute would fall far short of its goal of ending discriminatory state taxation. Under Subsections (b)(1) through (b)(3), only commercial and industrial property that is "subject to" the property tax is to be considered in determining whether an improper assessment ratio or tax rate has been applied to railroad property. These provisions have no mechanism for taking into account the potentially discriminatory effect of an expansive scheme of tax exemptions for non-railroad property. See note 5, *supra*; note 24, *infra*. If the general prohibition against state tax discrimination in Subsection (b)(4) did not apply to property taxes, the States would be able to renew their historical discrimination against railroads by adopting a broad set of tax exemptions for non-railroad property, thereby shifting a disproportionate share of the property tax burden to rail carriers. The history of litigation under the 4-R Act reveals that this concern is not fanciful.

<sup>17</sup> This understanding of the statute does not require the conclusion that the broad nondiscrimination clause of Subsection (b)(4) nullifies the specific, objective tests of Subsections (b)(1) through (b)(3). Subsections (b)(1) through (b)(3) bar the States from imposing higher assessment ratios and tax rates for railroad property than for non-railroad property. Under the *per se* tests of these Subsections, a court need not consider whether such differential treatment of railroad property otherwise constitutes "discrimination." These provisions impose an objective test. The use of differential rates for assessing or taxing railroad and non-railroad property is unlawful without further inquiry. See *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 464. By contrast, Subsection (b)(4) applies only when the court finds that the state tax results in "discrimination" against rail carriers. See 49 U.S.C. 11503(b)(4). See pages 16-24, *infra*. That there may be some overlap among the various subsections is not surprising given the breadth of the statutory goal. See *Connecticut National Bank v. Gerstein*, 112 S. Ct. 1146, 1149 (1992).

For example, in *Burlington Northern R.R. v. Bair*, 766 F.2d at 1223, Iowa "assessed \* \* \* *ad valorem* tax payments on [railroad] personal property in the state while effectively exempting the personal property of most other taxpayers." The State exempted "ninety-five percent of personal property owners from taxation." *Id.* at 1224. In concluding that this discriminatory exemption scheme violates the statute, the court rejected the State's claim that Subsection (b)(4) "applies only to taxes other than property taxes" (766 F.2d at 1224):

In our judgment, [Subsection (b)(1)] covers claims of unequal valuation ratios between railroad and other commercial and industrial property, but not classification discrimination such as is presented here. [Subsection (b)(4)] is a broad provision intended to reach all types of discriminatory tax treatment.

Other States also have employed broad exemption schemes to place discriminatory tax burdens on rail carriers. See, e.g., *Trailer Train Co. v. Leuenberger*, 885 F.2d at 416 ("75.75% of commercial and industrial personal property is exempt from taxation in Nebraska"). As the Fourth Circuit explained in *Clinchfield R.R. v. Lynch*, 784 F.2d at 552, the problem with such exemptions

is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would soon be swallowed up in the exceptions.

Accord *Trailer Train Co. v. Leuenberger*, 885 F.2d at 418.

To prevent the States from a wholesale shifting of the burden of property taxes to railroads, the potentially discriminatory effect of property tax exemptions must be considered under Subsection (b)(4). Any other interpretation of the statute requires the illogical assumption that Congress enacted a self-defeating scheme that permits the States to discriminate against rail carriers by the simple

artifice of exempting all other property owners from their property tax base. The court of appeals correctly held (Pet. App. 13a-16a) that, in enacting the "catch-all" provisions of Subsection (b)(4), Congress did not sanction such facile evasion of the nondiscrimination requirements of the statute.

## II. THE MERE EXISTENCE OF DIFFERENCES BETWEEN STATE TAX TREATMENT OF RAILROAD AND SPECIFIED CLASSES OF NON-RAILROAD PROPERTY DOES NOT ALONE CONSTITUTE DISCRIMINATION UNDER SUBSECTION (b)(4) OF THE 4-R ACT

Unlike Subsections (b)(1) through (b)(3), which provide objective criteria for identifying specific types of proscribed unequal tax treatment of railroad property, Subsection (b)(4) provides no clear guidance for determining what constitutes prohibited "discriminat[ion] against a rail carrier" (49 U.S.C. 11503(b)(4)). The text of Subsection (b)(4) does not identify any specific or quantitative test. In this context, the court of appeals stated that "[t]he most natural reading" of the statute is that it "is violated by *any* exemption given to other taxpayers but not to railroads" (Pet. App. 16a). The court held that any such difference in the tax treatment of railroad and non-railroad property "violates the statute" (*id.* at 17a).<sup>18</sup>

This interpretation of the statute is not correct. The court's holding fails to give the terms of the statute their ordinary meaning and cannot be reconciled with the structure and purpose of the Act.

1. a. It is well established that "the words of statutes \* \* \* should be interpreted where possible in their ordinary, everyday senses" (*Malat v. Riddell*, 383 U.S. 569, 571 (1966) (quoting *Crane v. Commissioner*, 331 U.S.

<sup>18</sup> The court stated, as a "possible qualification" to its broad holding, "that a *de minimis* level of exemption available only to other taxpayers may not state a claim under [Subsection (b)(4)]" (Pet. App. 17a). See note 5, *supra*.

1, 6 (1947))). The ordinary meaning of the word "discriminate" is the "failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d at 380 n.4 (quoting *Baker v. California Land Title Co.*, 349 F. Supp. 235, 238 (C.D. Cal. 1972), *aff'd*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975)). Accord *Department of Revenue v. Trailer Train Co.*, 830 F.2d at 1574. The dictionary defines the word "discriminate" to mean "to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs *rather than according to actual merit*." *Random House Dictionary* 564 (unabridged 2d ed. 1987) (emphasis added). Economic "discrimination" does not exist simply because two classes are treated *differently*. It exists when they are treated differently without an acceptable justification.

The Court has recognized this common meaning of economic "discrimination" in a variety of regulatory statutes. For example, under transportation statutes that prohibit common carriers from discriminating in rates, the Court has held that the mere fact that "differential treatment" exists does not alone establish discrimination.<sup>20</sup> Instead, discrimination exists only if "it also appears that [the] differential treatment is not justified by differences in [the] operating conditions that substantially affect the allegedly discriminating carrier." *Western Pacific R.R. v. United States*, 382 U.S. 237, 246 (1965). See also *United States v. Illinois Central R.R.*, 263 U.S. 515, 521 (1924); *Providence & W. R.R. v. United States*, 666 F.2d 736, 740 (1st Cir. 1981) ("a carrier may prefer one line over another if the preference is justified by differences in conditions").<sup>21</sup>

<sup>20</sup> These cases arose under former Section 3(4) of the Interstate Commerce Act, which provided that common carriers "shall not discriminate in their rates, fares, and charges between connecting lines" (49 U.S.C. 3(4) (1964)).

<sup>21</sup> Section 306 drew its origin from these statutes regulating common carriers. The introductory clause of Section 306 proscribes



Similarly, in cases involving intergovernmental tax immunity, the fact that a state tax treats those who deal with the federal government differently from others does not alone establish discrimination. The existence of economic discrimination in this context, as elsewhere, turns on whether the differences in treatment can be justified by "significant differences between the two classes." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 815-816 (1989). Accord *Washington v. United States*, 460 U.S. 536, 542 (1983); *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 382 (1960).

The fact that a state tax affords different treatment to railroad property than to non-railroad property thus does not alone establish that "discrimination" has occurred. It does, however, establish a prima facie case of discrimination that the State must rebut by an adequate demonstration of its justification for the different treatment. See *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 376 ("[i]n a 4-R case, the railroads need only establish that the tax is facially discriminatory, after which the tax must be justified, if possible, by the state").<sup>22</sup>

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acts that constitute "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce" (Pet. App. 39a). This phrasing is derived from former Section 13(4) of the Interstate Commerce Act, which proscribed action by a State that constituted an "unreasonable, or unjust discrimination against, or an undue burden on, interstate or foreign commerce" (49 U.S.C. 13(4) (1964)). See S. Rep. No. 1483, *supra*, at 9.

<sup>22</sup> *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), is not to the contrary. *Snead* involved Section 2121(a) of the Tax Reform Act of 1976, which proscribed any state "tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers \* \* \* or consumers of that electricity" (15 U.S.C. 391). The Court concluded that it was unnecessary to consider the State's contention that other features of the State's tax law might counterbalance its discriminatory state energy tax, because "the federal statutory provision is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State." 441 U.S. at 149. By contrast, the statute involved in this case broadly proscribes any state tax that "discriminates against a

b. That Congress did not intend the word "discriminate" to have a broader sweep in Subsection (b)(4) than it has in other similar contexts is confirmed by the language and structure of the Act, as well as by its legislative history. The 4-R Act was not designed to deprive the States of all latitude in determining what property may be subject to tax and how various classes of property are taxed. For example, a property tax violates Subsections (b)(1) through (b)(3) only if the assessment ratio or tax rate applied to property of the railroad is higher than the "average" assessment ratio or tax rate applicable to the comparison class as a whole. *Arizona v. Atchison, T. & S.F. R.R.*, 656 F.2d at 404; *General American Transportation Corp. v. Kentucky*, 791 F.2d 38, 42 (6th Cir 1986).<sup>23</sup> Even then, relief may not be granted unless the assessment ratio applicable to railroad property exceeds the assessment ratio applicable to all other "commercial and industrial property" by five percent or more. 49 U.S.C. 11503(c). Under the decision in this case, however, if *any* class of property receives a more favorable assessment ratio or tax rate, the tax, although valid under Subsections (b)(1) through (b)(3), would necessarily fail under Subsection (b)(4).

The statutory definition of "commercial and industrial property"—which is used as a comparison basis for purposes of Subsections (b)(1) through (b)(3)—further reflects that Congress did not require the States to tax railroad property on the most favorable basis granted to *any* class of property. "[L]and used primarily for agricultural purposes or timber growing" is specifically excepted from the class of "commercial and industrial property" used for this comparison purpose. See 49 U.S.C. 11503 (a)(4). Under the analysis of the court of appeals, how-

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rail carrier" (49 U.S.C. 11503(b)(4)) and is not limited to any particular type or method of state taxation.

<sup>23</sup> See S. Rep. No. 630, *supra*, at 10 ("To make the fairest comparison—that of the carrier with the hypothetical 'average' taxpayer—the committee intends that the unit to be used is that of all parcels of property in the district, considered in the aggregate").



ever, a property tax framed in the manner permitted under Subsections (b)(1) through (b)(3)—and imposed equally on all classes of property other than “land used primarily for agricultural purposes or timber growing”—would fail under Subsection (b)(4) simply because that exemption was “given to other taxpayers but not to railroads” (Pet. App. 16a).

The statutory definition of “commercial and industrial property” is also limited to property that is in fact “subject to a property tax levy” (49 U.S.C. 11503(a)(4)). The legislative history confirms, as the language of the statute suggests, that this definition was crafted to exclude exempt property from the comparison base under Subsections (b)(1) through (b)(3).<sup>24</sup> A law review article by the Oregon Assistant Attorney General suggests that the provisions of the statute that delete exempt property from the comparison class under Subsections (b)(1) through (b)(3) “would be rendered superfluous if property tax exemptions are found discriminatory” under Subsection (b)(4). J. Laronge, *Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 Willamette L. Rev. 635, 653 (1990). The fact that property tax exemptions violate Subsection (b)(4) when they lack a valid justification, however, does not require the conclusion that *all* exemptions lack such a justification and are proscribed by the statute. See pages 21-24, *infra*. Only by concluding, as the court of appeals did in this case, that *any* difference in treatment of railroad and non-railroad property

<sup>24</sup> Congress enacted this restriction in response to lobbying by the States to avoid consideration of exempt property under the “equal assessment” and “equal tax” rate requirements of Subsections (b)(1) through (b)(3). See 4 *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 116 (1967) (Oregon State Tax Comm.); 6 *Hearing Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. 83, 86-87 (1969) (Western States Assoc. of Tax Administrators); 9 *Hearing Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 89-90 (1970) (California Bd. of Equalization).

violates Subsection (b)(4) is the omission of exempt property from consideration under the objective tests of Subsections (b)(1) through (b)(3) made superfluous.<sup>25</sup>

2. a. Once disparate state tax treatment of rail carriers is established, the remaining inquiry under Subsection (b)(4) is the validity of the justifications offered by the State. The proffered justifications will, of course, vary with the nature and scope of the different treatment involved. For this reason, it is impractical and unnecessary for the Court to attempt in this case to delineate what would constitute sufficient justification for all of the varied forms of differential tax treatment in which the States may engage. Nonetheless, as a general principle, the inquiry into the validity of specific proffered justifications should be guided in each case by the statute’s goal of preventing the States from imposing a disproportionate share of tax burdens upon rail carriers.

For example, any state taxing scheme that has the design or effect of singling railroads out for substantially harsher treatment than meted out to other property owners would not be justifiable. See *Burlington Northern R.R. v. City of Superior*, 932 F.2d at 1188. A scheme that taxes railroad property but exempts all or most non-railroad property within the State falls within the core of “discrimination” that Subsection (b)(4) proscribes. See, e.g., *Trailer Train Co. v. Leuenberger*, 885 F.2d at 418 (property tax that exempts 75% of non-railroad property violates Subsection (b)(4)).

On the other hand, a State may be able in a particular case to justify a specific tax exemption by showing that

<sup>25</sup> The Conference Committee deleted a Senate amendment that would have made the statute inapplicable “in any State which, on the date of enactment of this section, ha[d] in effect a provision of its constitution (or an amendment thereto) which provides for the reasonable classification of property for State purposes” (S. Rep. No. 499, 94th Cong., 1st Sess. 233 (1975)). See S. Conf. Rep. No. 595, *supra*, at 166. The fact that Congress declined to give the States a blanket approval for property tax exemptions confirms that the States retain the burden of justifying differential tax treatment under Subsection (b)(4).

the exempt property is subject to alternative state or local taxes that are not levied against railroads.<sup>26</sup> For example, an exemption of motor vehicles from a state property tax may be justified if the vehicles are subject to alternative tax and licensing fees. See Or. Rev. Stat. Ann. § 803.585 (1989). If the owners of such property bear a comparable share of the State's tax burden *on property*, it could not be said that a disproportionate share of that tax burden has been shifted to rail carriers.<sup>27</sup>

We agree, however, with the courts that have held that an economic study of the entire burden of all forms of state taxation on railroad and non-railroad property is not required to determine whether discrimination has occurred under Subsection (b)(4).<sup>28</sup> A State's exemption of business inventories (see pages 3-4, *supra*) thus could not be justified on the ground that such inventories may be expected to generate additional sales, use or income taxes. Railroad property also generates, through its use, additional sales and income taxes. A property tax exemption not available to railroad property "discriminates against a

<sup>26</sup> In *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), the court held that taxes that are narrowly drawn to apply solely or primarily to activities in which only railroads engage must be set aside under Subsection (b)(4) without regard to whether the State might impose *other* taxes on comparable activities of other taxpayers. The court acknowledged, however, that a State may be able to defend a tax that is imposed on an activity in which railroads are not the sole actors. 932 F.2d at 1188.

<sup>27</sup> Petitioner has taken the position that certain of the State's exemptions (for motor vehicles and standing timber) may be justified on the basis that such property is subject to alternative taxing schemes. See note 7, *supra*. Neither the district court nor the court of appeals addressed those claims. Absent findings on this issue, we express no opinion as to whether the State's alternative taxing schemes provide a sufficient justification for the exemptions challenged in this case.

<sup>28</sup> See, e.g., *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302-1303 (8th Cir.) (an "in-depth examination of [the State's] complete tax structure" is not required to evaluate a claim of discrimination under Subsection (b)(4)), cert. denied, 112 S. Ct. 169 (1991); *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 375 (same).

rail carrier" if the alternative taxes to which the exempt property is subject are not a substitute for the property tax or if rail carriers are also subject to those alternative taxes.<sup>29</sup>

We therefore disagree with the conclusion of the district court that exemptions do not "discriminate against a rail carrier" merely because the favored classes comprise less than 30% of the aggregate value of the commercial and industrial property in the State (Pet. App. 32a). A state tax exemption that serves no purpose other than to grant favorable treatment to a substantial segment of local property owners cannot be justified under Subsection (b)(4). It is true, of course, that Congress did not intend to require precise uniformity in the treatment of railroad and non-railroad property. Subsection (c) contains an express exception for property tax assessments that impose no greater than a five percent discriminatory disadvantage on railroad property. See 49 U.S.C. 11503 (c); Pet. App. 17a. Although this provision does not, by its terms, apply to the discrimination proscribed by Subsection (b)(4), it would be incongruous to conclude either (i) that discrimination that falls *below* this express statutory threshold should nonetheless come within the ambit of the more general provisions of Subsection (b)(4) or (ii) that discrimination that *exceeds* the express statutory threshold should *not* come within the general proscription against discrimination in that Subsection. The limited leeway that Congress gave the States in shaping

<sup>29</sup> The fact that Congress removed "land used primarily for agricultural purposes or timber growing" from the statutory definition of "commercial and industrial property" (49 U.S.C. 11503(a)(4)) indicates that Congress intended to allow the States to treat such property on a more favorable basis without running afoul of the Act. Similarly, charitable and educational property ordinarily would not fall within the concept of "commercial and industrial property," and exemptions favoring such property would therefore be permissible. But Congress identified no other class of property for which favorable treatment is presumptively allowed. The burden thus remains with the States to justify favorable treatment for any other types of non-railroad property.



property tax policies is as appropriate under Subsection (b)(4) as it is under the objective criteria of the preceding subsections. Congress did not insulate railroads completely from state tax policies, and also did not give the States a free hand to impose meaningfully greater tax burden on railroads than on the general mass of other property owners.

b. Neither the district court nor the court of appeals considered or determined which of the exemptions involved in this case would—and which would not—constitute an unjustified “discrimination” under the particularized analysis that the statute requires. This case should therefore be remanded to the lower courts for their consideration of these underlying factual issues in the first instance.

### III. THE REMEDY FOR A VIOLATION OF SUBSECTION (b)(4) SHOULD BE DESIGNED TO PROVIDE EQUIVALENT TAX TREATMENT FOR RAILROAD AND NON-RAILROAD PROPERTY

The court of appeals concluded that the exemptions challenged in this case discriminate against rail carriers. The court held that the proper remedy for this violation of Subsection (b)(4) is “the same total exemption [for rail carriers that] preferred property owners enjoyed” (Pet. App. 19a). The court therefore directed the district court to enjoin the State’s “collection of the ad valorem tax” on all property that respondents own (*ibid.*).

The extreme remedy selected by the court of appeals no doubt serves to eliminate any observed discrimination against rail carriers. The sweeping breadth of this remedy, however, is not consistent with the remedial provisions of the Act, which seek to achieve equivalent—not preferential—tax treatment for rail carriers.

1. A preliminary question exists as to the power of the federal courts to award *any* injunctive relief for violations of Subsection (b)(4). 28 U.S.C. 1341 generally bars federal courts from enjoining “the assessment, levy or collection of any tax under State law where a plain,

speedy and efficient remedy may be had in the courts of such State.” Even when a state tax is claimed to violate the Constitution or a federal statute, 28 U.S.C. 1341 deprives federal courts of jurisdiction to enjoin the tax so long as state tax refund procedures provide an adequate opportunity for the taxpayer’s claim to be raised and considered. See *Franchise Tax Board v. Alcan Aluminum Ltd.*, 493 U.S. 331, 338, 341 (1990); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 622-623 (1946); *Bland v. McHann*, 463 F.2d 21, 24-25 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973).

Congress was aware of this general obstacle to federal court jurisdiction and therefore provided in Section 306(2) of the 4-R Act (Pet. App. 39a-40a):<sup>20</sup>

Notwithstanding any provision of section 1341 of title 28, United States Code, or of the [c]onstitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain[,] or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection; [and]

\* \* \* \* \*

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to [railroad] property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

\* \* \* \* \*

<sup>20</sup> The reworded version of the statute is not materially different. See 49 U.S.C. 11503(c).



The introductory clause of this provision removes the bar of 28 U.S.C. 1341 from suits to enjoin "any acts in violation" of this statute. The succeeding two clauses, however, (i) preserve concurrent state court jurisdiction over such claims and (ii) permit "no relief" to be granted under the statute "unless" the assessment ratio on railroad property is at least five percent higher than the assessment rate for other commercial and industrial property.

On its face, this provision seems "oddly cast" (*Kansas City Southern Ry. v. McNamara*, 817 F.2d at 371) and "presents a sticky exercise in statutory interpretation" (*Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 (9th Cir.), cert. denied, 464 U.S. 846 (1983)). The statute could be read to permit injunctive relief in federal courts only for violations of the "equal assessment ratio" requirements of Subsections (b)(1) and (b)(2) and to remit rail carriers to state court tax refund procedures for challenges based upon the "equal tax rate" and general nondiscrimination requirements of Subsections (b)(3) and (b)(4).<sup>21</sup> The courts that have addressed this question, however, have consistently concluded that the statute should not be understood to require that result. See *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 371; *Trailer Train Co. v. State Board of Equalization*, 697 F.2d at 865-866.

The statute directly empowers the federal courts to award such injunctive relief "as may be necessary to prevent, restrain[,] or terminate any acts in violation of" Section 306 (Pet. App. 40a (emphasis added)). The subsequent clause—which precludes the award of relief unless assessment-ratio discrimination in excess of five percent is present—can only rationally be understood as a limit on the availability of relief for assessment-ratio discrimination. Any other interpretation would strip all plausible meaning from the language that authorizes fed-

<sup>21</sup> The potential relevance of this provision to this case was not raised or considered below. Since the issue it presents relates to subject matter jurisdiction, it is proper for it to be addressed at this time.

eral courts to enjoin "any acts" in violation of the statute. *Trailer Train Co. v. State Board of Equalization*, 697 F.2d at 866.

As this Court held in *Philbrook v. Glodgett*, 421 U.S. 707 (1975), a statute must be interpreted by considering "the provisions of the whole law, and \* \* \* its object and policy" (*id.* at 713). To give meaning to the authority provided to enjoin "any acts" in violation of Section 306 (Pet. App. 40a), and to accomplish the statute's object of proscribing all forms of discriminatory state taxation of railroads, the courts have consistently and properly held that "[f]ederal courts have jurisdiction over a case alleging discriminatory taxation in violation of [Subsections (b)(3) and (b)(4)]." *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 371.

2. In cases involving constitutional challenges to a state tax, the Court has held that a federal court should not "decree a valid tax for the invalid one which the State had attempted to exact." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). When the tax is found to conflict with the Constitution, the proper decree is that "it 'may not be exacted.'" *Ibid.* (quoting *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. at 387). The remedy adopted by the court of appeals in this case could be said to be consistent with that remedial principle.

In enacting the 4-R Act, however, Congress concluded that the remedial approach of *Moses Lake* should not apply. The jurisdictional provisions of the statute authorize injunctive relief only to the extent "necessary to prevent, restrain[,] or terminate any acts in violation of this section" (Pet. App. 39a-40a). Congress considered and rejected the suggestion that the remedial model of *Moses Lake* should apply under the 4-R Act and that injunctive relief under the Act "should deal with the tax in its entirety rather than with so much of the tax as is discriminatory" (S. Rep. No. 630, *supra*, at 13):

Such a provision could cause economic hardship and inconvenience upon States and localities that might

be affected. There is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion.

See also S. Rep. No. 1483, *supra*, at 12 ("There is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion").<sup>32</sup> For this reason, Congress authorized injunctive relief under the 4-R Act only from "the excessive portion of a State or local transportation property tax." S. Rep. No. 630, *supra*, at 11.

The remedy that is "necessary" to prevent the discrimination proscribed by Subsection (b)(4) is an injunction that bars the States from imposing an unequal or disproportionate share of the burden of the challenged tax on railroads. The object of the statute is not to obtain for rail carriers the most preferential tax treatment available. It is to obtain for rail carriers equivalent treatment with the general mass of other taxpayers. See pages 16-24, *supra*. To accomplish such treatment, it is unnecessary for the courts to enjoin application of the State's "entire rate or assessment scheme."<sup>33</sup> *Kansas City Southern Ry. v. McNamara*, 817 F.2d at 378. See *Burlington Northern R.R. v. Bair*, 766 F.2d at 1224. The broad remedy adopted by the court of appeals in this case conflicts with the narrower remedial language that Congress employed.

<sup>32</sup> See also H.R. Rep. No. 725, *supra*, at 78 ("Federal courts will be able to devise remedies that will not be burdensome to the communities involved").

<sup>33</sup> If railroads were thus provided with the most favored treatment available for violations under Subsection (b)(4), railroads would not only not be paying more than their fair share of the State's tax burden, they would, at least in exemption cases, be paying no tax at all. Nothing in the statute supports a conclusion that the States are required to provide more favorable tax treatment to railroad property than is afforded to the general mass of other property in the State.

We do not, however, mean to suggest that a remedy that enjoins collection of the entire tax is never warranted. Such a remedy may be appropriate when the State's tax is drawn so narrowly that it is imposed only on rail carriers. See, e.g., *Burlington Northern R.R. v. City of Superior*, 932 F.2d at 1188.

The breadth of the court's remedy also conflicts with the more tailored remedies provided under Subsections (b)(1) through (b)(3). In cases involving these subsections, courts have not afforded railroads the same treatment as taxpayers holding property with the lowest assessment ratio or tax rate. Instead, they have required the assessment ratio or tax rate for railroad property to be adjusted to equal that applicable to the general mass of commercial and industrial property. See, e.g., *Clinchfield R.R. v. Lynch*, 784 F.2d at 550-551. When more than one tax rate is applicable to various classes of property, the States are enjoined to tax railroad property at a rate reflecting the weighted average of the various rates, not at the most favorable rate. *General American Transportation Corp. v. Kentucky*, 791 F.2d at 42; *ACF Industries, Inc. v. Arizona*, 714 F.2d 93, 95 (9th Cir. 1983); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d at 867-868.

There is no basis for a broader remedy under Subsection (b)(4). An ad valorem property tax that violates the equal assessment or tax rate requirements of Subsections (b)(1) through (b)(3) may also be found (and, indeed, under the court of appeals' approach would necessarily be found) to result in "discrimination" under Subsection (b)(4). The remedy provided for the same violation under the several subsections should not differ.

The proper remedy under this statute is one that places the rail carrier in a position that would not constitute a violation of the Act. Thus, if a State's exemptions of 25% of non-railroad property lack justification and therefore violate Subsection (b)(4), the appropriate remedy is to exempt 25% of railroad property from tax—not to exempt all railroad property. No further remedy is "necessary" or authorized by the statute.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings consistent with the Court's opinion in this case.

Respectfully submitted.

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JULY 1993



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF OREGON, and  
RICHARD MUNN, in his capacity as Director  
of the Department of Revenue,

v. *Petitioners,*

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GENERAL ELECTRIC RAILCAR SERVICES CORP.;  
PULLMAN LEASING CO.; RAILBOX CO.; RAILGON CO.;  
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*Respondents.*

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U.S. CONFERENCE OF MAYORS, COUNCIL OF  
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## QUESTION PRESENTED

*Amici* will address the following question:

Whether 49 U.S.C. § 11503(b)(4) prohibits States from pursuing legitimate state interests through granting property-tax exemptions to various classes of property not owned or used by interstate railroads.

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OFFICERS, JOINED BY THE MULTISTATE  
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IN SUPPORT OF PETITIONERS

## INTEREST OF THE AMICI CURIAE

*Amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Among the most important of such issues are those raised by federal limitations on state and local taxing authority, such as the antidiscrimination provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 49 U.S.C. § 11503. The decision of the Ninth Circuit in this case, holding that Section 11503 is violated whenever a state or local taxing authority exempts from its property tax any (non-*de minimis*) class of property not used by railroads, would require either the elimination of property-tax exemptions prevalent in virtually every State (serving legitimate interests having nothing to do with railroads) or the grant to railroads of broad immunity from normal property taxes (causing severe fiscal losses to state and local governments). With more than \$100 million in annual tax revenues at stake (see Amended Br. of Multistate Tax Commission (at petition stage) at 13-14), the decision presents a grave threat to the existing tax schemes, revenue-raising powers, and legislative discretion of state and local governments. *Amici* have a vital interest in seeing that this misconstruction of the 4R Act is corrected.<sup>1</sup>

## STATEMENT

1. *The 4R Act*. As part of the 4R Act's broad effort to revitalize the Nation's railroads, Congress enacted "a prohibition on discriminatory state taxation of railroad property." *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Congress was concerned that discriminatory taxes were placing excessive

<sup>1</sup> The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

burdens on railroads because "interstate carriers 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. 630, 91st Cong., 1st Sess. 3 (1969)); H.R. Rep. 725, 94th Cong., 1st Sess. 78 (1975). The prohibition on discriminatory taxation was enacted as Section 306 of the 4R Act, Pub. L. No. 94-210, 90 Stat. 54. The provision was subsequently recodified, with a declared intent to make no substantive change, as 49 U.S.C. § 11503. See Revised Interstate Commerce Act, §§ 11101, 11503, 3(a), Pub. L. No. 95-473, 92 Stat. 1419, 1445, 1466; *Burlington Northern R.R.*, 481 U.S. at 457 n.1.

The structure of Section 11503 is simple. Subsection (a) defines critical terms. Subsection (b) sets forth the prohibitions on discrimination. Subsection (c) then lifts the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. § 1341, in specified circumstances to permit direct enforcement of the statute by federal district courts.

The operative antidiscrimination provision, subsection (b), is itself simple in structure. Subsections (b)(1) through (b)(3) bar discrimination in each of the steps involved in property taxation: (b)(1) forbids *assessment* of rail transportation property at a higher ratio of its true market value than the ratio at which other "commercial and industrial property" is assessed; (b)(2) forbids *levy* of a tax based on such a disparate assessment; and (b)(3) forbids higher tax *rates* for rail transportation property than for other "commercial and industrial property." (The critical term "commercial and industrial property" is specifically limited to property that is actually "subject to a property tax levy." § 11503(a)(4).) Subsection (b)(4) then forbids a taxing authority to "impose another tax that discriminates against a rail carrier" (*i.e.*,



an interstate carrier).<sup>2</sup> It is the meaning of this last provision that is at issue in this case.

2. *District Court Proceedings.* Oregon imposes an ad valorem tax on all real and personal property that is not expressly exempted. Pet. App. 5a. The State exempts various types of personal property, including agricultural machinery and equipment, business inventories, livestock, poultry, bees, fur-bearing animals, and agricultural products in the possession of farmers. J.A. 17. The State also exempts motor vehicles from property taxation, but it imposes registration fees in lieu of such taxes. J.A. 18. In like manner, standing timber is exempt from the real-property tax but is subject to a separate severance tax. *Ibid.* Railroad cars, which are classified as personal property, are subject to Oregon's property tax and, like all personal property, are assessed at their full market value. Pet. App. 5a.

Respondents are eight companies engaged in the business of leasing railroad cars to railroads and to shippers. Pet. App. 22a. These "carlines" brought suit in federal district court alleging that Oregon's imposition of a property tax on their railroad cars, compared with the exemption from property tax of certain classes of personal property not owned or used by rail carriers, constituted unlawful discrimination under Section 11503. Although the railroad cars are "rail transportation property" covered by the statute's explicit prohibitions on discriminatory assessments, levies, and rates (§ 11503(b)(1)-(3)),<sup>3</sup> respondents did not bring their challenge under those provisions, presumably because the comparison class for purposes of those prohibitions, "commercial and industrial

<sup>2</sup> The original language of Subsection (b)(4)'s predecessor, Section 306(1)(d) of the 4R Act, prohibited "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad."

<sup>3</sup> Subsection 11503(a)(3) defines "rail transportation property" to mean property "owned or used by a rail carrier."

property," is expressly defined to include only property that is "subject to a property tax levy" (§ 11503(a)(4)), thereby excluding exempt property. See U.S. Br. 5 n.10 (exemptions are not actionable under (b)(1)-(3) because of the explicit definition of "commercial and industrial property" in (a)(4)). Instead, respondents alleged that Oregon's property tax, with its exemption of various types of non-railroad property, is "another tax that discriminates against a rail carrier," in violation of subsection (b)(4). J.A. 8-9 (Complaint).

The district court rejected the challenge. Pet. App. 21a-33a. The court first held that respondents, although not themselves rail carriers, had standing to allege discrimination under (b)(4) because of their "close connections" to the rail carriers—a ruling not at issue in this Court. See Pet. App. 25a-28a; Pet. 5 n.5. The court then held that Oregon's tax exemptions did not discriminate against railroads. No *de jure* discrimination is present, the court explained, because all personal property that is taxed is assessed at 100% of its value and is taxed at the same rate. Pet. App. 28a. Nor does *de facto* discrimination exist, the court reasoned: Oregon has not engaged in "backdoor" discrimination by, for example, "exempting all taxpayers except railroads" (Pet. App. 32a, 29a); rather, Oregon's exemption "scheme is neutral in application and there is no evidence that Oregon's tax system lacks an independently valid purpose." Pet. App. 32a.

3. *Court of Appeals Decision.* The court of appeals reversed, concluding that "any exemption not also available to railroads violates the statute, with the possible qualification that a *de minimis* level of exemption available only to other taxpayers may not state a claim under [§ 11503(b)(4)]." Pet. App. 17a.<sup>4</sup> The court began by

<sup>4</sup> While noting that petitioners had "apparently abandoned" the contention that respondents lacked standing to challenge an alleged discrimination against rail carriers, the Ninth Circuit evidently rejected the contention: "Section 306(1)(d) prohibits any tax

holding that, although property-tax discrimination is specifically addressed in each of subsections (b)(1) through (b)(3), property taxes are also actionable under subsection (b)(4)'s prohibition on discrimination in "another tax." Pet. App. 9a-13a. Subsection (b)(4) "must be read broadly," the court reasoned, to effectuate congressional intent and to "prohibit the states from doing indirectly what [subsections (b)(1) and (3)] prohibit them from doing directly." Pet. App. 13a. Moreover, the court concluded, although exemptions are not subject to challenge under subsections (b)(1) through (b)(3), they are subject to challenge under (b)(4). Pet. App. 13a-16a.

As to the substance of (b)(4)'s prohibition, the court then held, with virtually no explanation, that "[t]he most natural reading of th[e provision's] language is that the statute is violated by *any* exemption given to other taxpayers but not to railroads." Pet. App. 16a. The court stated that there might be a *de minimis* exception "to the statute's apparently absolute prohibition" (*id.* at 17a), but it declined to decide whether such an exception exists because at least "25% of non-railroad real and personal property is exempt" from Oregon's property tax (*id.* at 18a). The court remanded the case for entry of an injunction prohibiting Oregon's "collection of the ad valorem tax on the Carlines' property." Pet. App. 19a.

### SUMMARY OF ARGUMENT

Section 11503(b)(4) forbids a State or its subdivisions to "impose another tax that discriminates against" interstate rail carriers. The Ninth Circuit read the provision to invalidate any property-tax exemption not available to railroads. That reading is plainly incorrect. And a

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that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect. Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also 'results' in discrimination against the railroads." Pet. App. 7a n.2.

proper reading of the provision readily demonstrates the validity of Oregon's system of property-tax exemptions—for two separate reasons: the property tax is not "another tax"; and it does not "discriminate[] against" railroads.

The Ninth Circuit's interpretation must be rejected because it is flatly inconsistent with other parts of the same section. In defining the objective disparate-impact tests for property taxes set out in (b)(1)-(3), Congress carefully specified that the comparison class, "commercial and industrial property," excludes exempt property, thereby preserving the freedom of state and local governments to pursue traditional policies through the granting of tax exemptions. The Ninth Circuit's construction of (b)(4) nullifies that choice by re-introducing into the statute precisely the objective, disparate-impact test for exemptions that Congress expressly repudiated.

Once the Ninth Circuit reading is discarded, it is clear that (b)(4) is properly construed to require rejection of respondents' challenge to Oregon's statutory property-tax exemptions. One reason is that (b)(4) applies only to "another tax," and that phrase is naturally read—coming as it does after the specific restrictions on property taxes set forth in (b)(1) through (b)(3)—as limiting (b)(4) to taxes other than property taxes. This interpretation, in addition to according with the plain meaning of the language, makes structural sense in light of Congress's evident attempt to deal comprehensively with property taxes in (b)(1)-(3). And it comports with the evidence that Congress added (b)(4) to address "in-lieu" taxes, *i.e.*, non-property taxes imposed as a substitute for property taxes.

The second, independent reason for rejection of respondents' challenge is that subsection (b)(4)'s "discriminates against [railroads]" language is properly read not to apply to state tax classifications that serve legitimate policies independent of any disadvantaging of railroads.



This reading is supported not only by the principle that federal restrictions on core state powers should be narrowly construed, but also by the appropriateness, under Section 11503's express terms, of borrowing from the Commerce Clause standards for "discrimination" in construing (b)(4). Those standards bar only facial or other purposeful discrimination plus a narrow class of state measures that simply cannot be explained on the basis of any plausible state policy aside from the forbidden discriminatory policy. Oregon's tax exemptions, which make no reference to railroads, are obviously non-discriminatory under such principles, because they are readily seen to serve legitimate state interests without regard to their effect on railroads.

### ARGUMENT

#### **SECTION 11503(b)(4) DOES NOT PROHIBIT STATES FROM PURSUING LEGITIMATE STATE INTERESTS THROUGH GRANTING PROPERTY-TAX EXEMPTIONS TO NON-RAILROAD PROPERTY**

The Ninth Circuit's decision is wrong, both in its interpretation of Section 11503(b)(4) and in its holding. Its interpretation of (b)(4), as embodying a pure disparate-effects standard and therefore forbidding any exemptions that happen to be unavailable to railroads, is incorrect for the simple and sufficient reason that it contradicts other parts of the same section.<sup>5</sup> Moreover, under a proper interpretation of (b)(4), the Ninth Circuit's holding that Oregon's exemption system is invalid is incorrect for two reasons. First, subsection (b)(4) is properly read as not applying to property taxes. Second, a tax scheme does not "discriminate[] against a rail carrier" under (b)(4) unless it singles out railroads for adverse

<sup>5</sup> Because the Ninth Circuit rule is incorrect regardless of whether there is a *de minimis* exception to it, we omit mention of the possibility of such an exception in describing the Ninth Circuit's rule.

treatment on its face, intentionally, or without any independent legitimate justification.

These conclusions follow from straightforward statutory analysis, but it is worth noting that they are reinforced by the special interpretive principle applicable to express preemption provisions. Section 11503 explicitly sets federal limits on the legislative authority of state and local governments. It does so, moreover, in an area—taxation—historically and functionally central to the sovereign powers of States. *See, e.g.*, 28 U.S.C. § 1341 (Tax Injunction Act); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). Accordingly, the provision must be construed in light of the well-established presumption against preemption of traditional state powers. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-18 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The statute must be given a "fair but narrow reading." *Cipollone*, 112 S. Ct. at 2621 (opinion of Justice Stevens, joined by Chief Justice Rehnquist, Justice White, and Justice O'Connor); *id.* at 2626 (opinion of Justice Blackmun, joined by Justice Kennedy and Justice Souter) (where statutory language is ambiguous, Court does not, "absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language") (footnote omitted); *see also Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400, 2404 (1991). In short, if there are two permissible readings of the statute, the one less restrictive of state authority is to be preferred.

#### **A. Section 11503(b)(4) Cannot Be Read to Preclude States from Granting Property-Tax Exemptions to Non-Railroad Property.**

The Ninth Circuit held that a State's granting of "any exemption not also available to railroads" unlawfully dis-



criminate against railroads in violation of Section 11503 (b)(4). Pet. App. 17a. Whatever else subsection (b)(4)'s bar on discrimination may mean, however, it cannot mean what the Ninth Circuit held. That purely objective disparate-effects test for exemptions would directly nullify Congress's explicit decision, in defining "commercial and industrial property," to exclude exempt property from the objective disparate-effects tests set forth for property-tax discrimination in (b)(1)-(3). The Ninth Circuit ruling thus violates the fundamental principle that a statutory provision cannot be read to override the clear congressional choice embodied in another provision of the statute, much less in the same section. See, e.g., *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative'") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).<sup>6</sup>

Whenever a taxing authority grants an exemption to non-railroad property, that property is being assessed at 0% of its market value and taxed at a 0% rate. If that property were included among the "commercial and industrial property" in the assessment jurisdiction, and all other such property were assessed and taxed at the same ratio and rate as railroad property, then by mathematical necessity there would be both assessment and rate discrimination in violation of (b)(1)-(3): the 0% ratio and

<sup>6</sup> See also *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 374-75 (1988) (interpretation of provision rejected as "structurally inconsistent" with other provision); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"); *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383-84 (1992) (citing "duty 'to give effect, if possible, to every clause and word of a statute,'" Court rejects interpretation of provision that, though "plausible . . . in isolation," "is not tenable in light of . . . surrounding provisions") (citation omitted).

rate bring down the average ratios and rates of the "commercial and industrial property" with which railroad property must be compared under (b)(1)-(3). Under the strict, objective comparisons of (b)(1)-(3), therefore, exemptions not available to railroads would be illegal—or would have to be carefully offset by selecting some non-railroad taxpayers for higher assessments or rates than railroads—if the comparison class, "commercial and industrial property," required inclusion of exempted property.<sup>7</sup> In other words, the Ninth Circuit's ruling is precisely equivalent to treating the comparison class for (b)(1)-(3) as including exempt property.

As respondents correctly recognized in bringing their challenge only under (b)(4), however, Congress specifically decided not to include exempt property in the comparison class for the objective discrimination bars of subsections (b)(1)-(3). See J.A. 8-9 (Complaint); see also Pet. App. 8a-9a (Ninth Circuit opinion, apparently accepting same conclusion); U.S. Br. 5 n.10 (recognizing inapplicability of (b)(1)-(3) to exempt property). Congress defined "commercial and industrial property" to include only property "subject to a property tax levy" (§ 11503(a)(4)), which, in its plain meaning, restricts the covered property to that which is actually taxed. A different phrase, "subject to property tax," might conceivably have excluded only property that is *incapable* of being taxed by a State or its subdivision—because, for example, of federal immunity or some other preemption. By insisting instead that the property actually be "subject to a property tax levy," Congress unmistakably limited the comparison class to property that the taxing authority actually taxed, thus excluding property exempt

<sup>7</sup> All exemptions would be flatly illegal if (b)(3)'s prohibition on subjecting railroads to "a tax rate that exceeds the tax rate applicable to commercial and industrial property" were read, not to look to an average of rates applicable to commercial and industrial property, but to forbid any rate disparity between railroads and any other such property.

from taxation.<sup>8</sup> See also § 11503(b)(2) (using “levy or collect” to refer to actual imposition of tax on a disparate assessment); § 11503(c) (“all other property *subject to a property tax levy*” is the comparison class in the event that the assessment ratio cannot be determined for “commercial and industrial property” using a “sales assessment ratio study”) (emphasis added).

That Congress in fact intended to exclude exempt property from (b)(1)-(3) may be inferred from the extreme, immediate, and radically disruptive consequences of reading the statute any other way. If exempt property were included in the comparison class, States and their subdivisions would be effectively barred from granting property-tax exemptions for traditional purposes such as encouraging particular businesses, eliminating undue administrative burdens, or substituting alternative taxes that are less easily avoided (by, *e.g.*, moving property out of the jurisdiction); otherwise, the taxing authorities would have to grant railroads automatic “most favored taxpayer” status or engage in an arbitrary process of raising tax rates (or assessment ratios) for a selected number of non-railroads to offset any retained or new exemption. At least in the absence of clear evidence, Congress must be presumed not to be working such an interference with state prerogatives and practices.

Not surprisingly, the legislative history confirms that Congress wrote the definition of “commercial and industrial property” to prevent such results. Thus, the 1969 Senate precursor of the 4R Act referred to “any other property” as the comparison class, though even then, the Senate Committee Report stated that “property totally or partially exempted is not intended to be taken as a mea-

<sup>8</sup> It is hardly a novel idea that equality guarantees in taxation should exclude exempt property from consideration: a leading text notes that this practice occurs under at least some state-law equalization requirements. See J. Hellerstein & W. Hellerstein, *State and Local Taxation* 68-69 (5th ed. 1988).

sure of” the comparison class. S. Rep. 630, 91st Cong., 1st Sess. 11 (1969). Various witnesses urged Congress to restrict the comparison class by adding “subject to a property tax levy” or a similar phrase to the statutory text, precisely in order to protect the ability of States and localities to grant exemptions for traditional policy reasons “completely unrelated to any deliberate discrimination against common carriers.”<sup>9</sup> The “subject to” language then became part of the bill, S. 2718, 94th Cong., 1st Sess. (1975), that passed the Senate in 1975, was accepted in conference, and was enacted into law in the 1976 4R Act. 121 Cong. Rec. 38499 (1975); S. Conf. Rep. 585, 94th Cong., 1st Sess. 166 (1975).<sup>10</sup>

In short, Congress made a deliberate choice to avoid the very crippling of States’ exemption-granting authority that the Ninth Circuit has now required. Thus, when the Ninth Circuit said that its reading of (b)(4) was needed to “prohibit the states from doing indirectly what [subsections (b)(1) and (3)] prohibit them from doing directly” (Pet. App. 13a), it got matters backwards. Subsections (b)(1) through (b)(3) could not be clearer

<sup>9</sup> *State Tax Discrimination Against Interstate Carrier Property, 1969: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Sen. Commerce Comm.*, 91st Cong., 1st Sess. 101 (1969); *id.* at 70, 86; *Common and Contract Carrier State Property Tax Discrimination, 1970: Hearing on H.R. 16245 et al. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 90, 94 (1970).

There is no indication, by contrast, that the “subject to” phrase was meant to remove from the comparison class only property, such as federally immunized property, that state and local governments are legally incapable of taxing.

<sup>10</sup> At the same time that the House accepted this limitation on the scope of the antidiscrimination provision, the Senate receded from its provision permitting States to preserve pre-existing constitutional provisions containing reasonable classifications of property for state purposes. See S. Conf. Rep. 585, *supra*, at 167.



that Congress meant to allow States to grant exemptions, free from the rigid objective comparison called for by those subsections. The Ninth Circuit ruling undoes that decision by reading (b)(4) to prohibit what (b)(1) through (b)(3) allow.

For that reason, the Ninth Circuit's reading of (b)(4) must be rejected if the provision can be read another way. Here, such an alternative is available. Indeed, as discussed in the next two sections, there are two independently sufficient reasons why subsection (b)(4) does not bar States from doing what Oregon has done—serving legitimate state interests by granting property-tax exemptions to non-railroad property.

#### **B. Section 11503(b)(4) Is Properly Read as Inapplicable to Property Taxes.**

Subsection (b)(4) forbids a State or its subdivision to “impose *another* tax that discriminates against” railroads (emphasis added). See also 4R Act, § 306(1)(d) (“any other tax”). The critical word “another” means “different or distinct from the one first named or considered.” *Webster's Third New International Dictionary* 89 (1971). Because each of subsections (b)(1) through (b)(3) specifically addresses property taxes—either through explicit references to an “ad valorem property tax” or through language referring to “assessment,” defined by subsection (a) to refer to “a property tax”—the natural meaning of “another tax” in (b)(4) is a tax different from a property tax.

The Ninth Circuit read (b)(4) as a genuine catch-all provision, encompassing even the types of taxes already addressed in the previous paragraphs. But that view effectively reads “another” out of the statute. Congress could easily have written (b)(4) to forbid taxing authorities to “impose *any* tax that discriminates” if it had meant to write a catch-all provision. But Congress did not use such language either in the original 4R Act or in the

recodification. Instead, Congress twice used language naturally referring to taxes different from those already addressed, *i.e.*, taxes other than property taxes.

This reading makes not only linguistic but structural sense within Section 11503(b) as a whole. Subsections (b)(1) through (b)(3) address with precision each of the three steps of the imposition of a property tax. After that comprehensive addressing of property taxes, it makes sense for the next provision to cover new, rather than old, ground—here, taxes other than property taxes.<sup>11</sup> After all, there is no obvious gap in (b)(1)-(3)'s coverage of property taxes for (b)(4) to fill, as any challenged discrimination in a property tax would seem, as a matter of logic (and congressional understanding), to have to reside in at least one of the components of the tax—the assessment (and levy on it) or the rate—addressed by (b)(1) through (b)(3). See S. Rep. 630, 91st Cong., 1st Sess. 3 (1969) (“discriminatory taxation can arise in two ways: [higher assessments and higher rates]”).<sup>12</sup>

It is therefore hard to see what independent function (b)(4) would play as applied to property taxes. If (b)(4) is read as supplementing the protections of (b)(1)-(3) for property taxes, as the Ninth Circuit held, then it effectively furnishes means of challenging assess-

<sup>11</sup> See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (“However inclusive may be the general language of a statute, it ‘will not be held to apply to a matter specifically dealt with in another part of the same enactment.’”) (citation omitted); *Gozlon-Peretz v. United States*, 111 S. Ct. 840, 848 (1991) (“A specific provision controls over one of more general application.”).

<sup>12</sup> As explained, respondents’ challenge to Oregon’s exemption scheme in this case is nothing other than a claim either about differential assessments (railroad property is assessed at full value, while exempt property is assessed at zero, bringing the average of non-railroad assessments to less than full value) or about differential rates (exempt property is taxed at 0%, making the average rate for non-railroad property less than the rate for railroad property).



ment, levy, or rate discrimination in precisely those circumstances Congress deliberately left untouched in (b)(1) through (b)(3). That function, however, is illegitimate. Subsection (b)(4) plainly makes more sense, in the context of Section 11503 as a whole, if read as applying only to taxes other than property taxes.

The legislative history supports this reading. There appears to be no authoritative indication that (b)(4) was aimed at any form of property-tax discrimination, much less one not covered by (b)(1)-(3). To the contrary, the "any other tax" language, from the time it was introduced in 1974 through its final enactment, was repeatedly described as addressed to "in-lieu" taxes, that is, non-property taxes (such as gross receipts taxes) imposed as a substitute for property taxes for particular businesses.<sup>13</sup> Congressional understanding of (b)(4), in short, reflects its natural meaning as covering only taxes other than property taxes.

This construction cannot be rejected based on the objection, made by the Solicitor General, that it requires "the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute." U.S. Br. 11 (at petition stage). For one thing, this effort to avoid the plain meaning of "another tax" requires mischaracterization of the provision as referring to "'any other tax' method." *Id.* at 10. The statute, however, does not pro-

<sup>13</sup> *Railroads—1975: Hearings Before the Subcomm. on Surface Transportation of the Sen. Commerce Comm.*, 94th Cong., 1st Sess. Part 5 at 1837 (1975) ("taxes that are in lieu of discriminatory property taxes"); *see id.* at 1883-86 (describing gross receipts tax as target of language); H.R. Rep. 1381, 93d Cong., 2d Sess. 35-36 (1974); H.R. Rep. 725, 94th Cong., 1st Sess. 76-78 (1975); S. Conf. Rep. 585, *supra*, at 166 (describing House version, identical in this respect to Senate version, as barring "the imposition of a discriminatory 'in-lieu tax'").

scribe other "methods," but other "tax[es]," that are discriminatory. In any event, the plain meaning of the statute should not be disregarded in order to extend its reach to a hypothetical that would be independently subject to legal challenge—as the government's hypothetical, a State's singling out of interstate railroads for taxation, would be under established Commerce Clause standards (discussed below). Exclusion of such a hypothetical from a particular statute is hardly "absurd"—especially where there is no reason to think that the hypothetical is remotely a real possibility.<sup>14</sup> Accordingly, the evident restriction of (b)(4) to taxes other than property taxes should be respected, and respondents' challenge to Oregon's property tax scheme under (b)(4) rejected on that ground.

#### **C. Exemptions Are Not Discriminatory Under Section 11503(b)(4) If They Can Be Justified Independently of Their Effect on Rail Carriers.**

The starting point in construing Section 11503 (b)(4)'s language, "discriminates against a rail carrier," is to recognize its lack of a single plain meaning. As Professor Gunther has written of the closely related constitutional bar on "discrimination against interstate commerce," "'discrimination' is not a self-defining term." G. Gunther, *Constitutional Law* 251 (12th ed. 1991). The phrase refers almost inescapably to facial and other purposeful discrimination (here, on the basis of status as a railroad). But it is also capable of being read, as it is sometimes (though not always) read in other contexts, to refer more broadly to mere disparate impact. *Ibid.*

<sup>14</sup> If the hypothetical is varied so that (say) 75% of non-railroad property is exempt, it no longer can serve an "absurdity" argument, for it is hardly unreasonable to suppose that a State could exempt high proportions of the property in its borders for entirely legitimate reasons having nothing to do with discrimination against railroads, as Congress plainly intended States to be able to do. *See* pages 12-13, *supra*.

In the context of Section 11503(b)(4), no authoritative legislative history declares Congress's specific understanding of the meaning of "discriminates." Other tools of statutory construction, however, make plain that a general disparate-impact meaning cannot be attributed to Section 11503(b)(4). Indeed, it is clear that at most the provision reaches tax measures that either discriminate against railroads on their face or purposefully or, whatever the actual legislative motive, serve no possible state policy independent of disadvantaging railroads.

To begin with, if Section 11503(b)(4) is read to apply to property taxes (*but see* Argument B, *supra*), then rejection of a general disparate-impact standard is compelled by the need to avoid a direct conflict with the congressional determination to remove property-tax exemptions from the objective comparison of (b)(1)-(3) (*see* Argument A, *supra*). In any event, even if (b)(4) covers property taxes, the presumption against inferring preemption of traditional state powers requires rejection of a general disparate-impact reading. Indeed, that presumption, which demands selection of a narrower over a broader meaning in interpreting the scope of a preemption provision, could support rejection of *any* application of (b)(4) to claims of mere disparate effects: if the equal protection clause can be read to reach only purposeful discrimination (*Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *Washington v. Davis*, 426 U.S. 229 (1976)), so too can (b)(4)'s "discriminates against" language. The Court need not decide that question in this case, however, because Oregon's tax scheme plainly satisfies a slightly broader standard that naturally supplies at least an outer limit on the meaning of Section 11503(b)(4).<sup>15</sup>

<sup>15</sup> We note that a discriminatory-intent standard for (b)(4) is not precluded by this Court's statement in *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 463, that "Subsection (b) speaks only in terms of 'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer

The obvious reference for the meaning of the "discriminates" language of Section 11503(b)(4) is the Commerce Clause bar on discrimination against interstate business. After all, Section 11503 expressly frames its entire set of prohibitions as an application of that doctrine, declaring that the specified kinds of discrimination against railroads "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503(b). *See also* S. Rep. 445, 87th Cong., 1st Sess. 465-74 (1961) (Doyle Report). Moreover, Congress's expressed reason for enacting a special protection for railroads, as this Court explained in *Western Air Lines*, 480 U.S. at 131, was the very concern that underlies the antidiscrimination prohibition of the Commerce Clause—out-of-state businesses, lacking the legislative representation that in-state busi-

to the intent of the actor." As the Court said of a different statement in a different case, "[t]his statement, like all others in our opinions, must be taken in the context in which it was made." *Air Courier Conference v. American Postal Workers Union*, 111 S. Ct. 913, 920 (1991). The claim in *Burlington Northern* involved (b)(1), with its purely objective test for discrimination in property assessments, and the Court's statement merely rejected an effort to engraft an intent requirement onto that objective test for one set of claims (those involving overvaluation of railroad property). Neither the statement nor the case addressed the meaning of (b)(4).

Nor does the language of (b)(4)'s predecessor, Section 306 (1)(d) of the 4R Act—"results in discriminatory treatment"—preclude an intent standard. Even aside from the fact that the current statutory language is different, what must "result" is "discriminatory treatment," the familiar name for an intent standard. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993). Moreover, Congress's elimination of "results" language in the recodification belies any suggestion that the language demands an effects test, a suggestion for which no other support exists and which would violate other rules of construction (as explained in text below). And, as the Ninth Circuit itself explained, the phrase has an obvious alternative significance: it enables (b)(4) to reach indirect as well as direct impositions on railroads. Pet. App. 7a n.2; note 4, *supra*.



nesses have, are "easy prey" for state legislatures.<sup>16</sup> Accordingly, although Commerce Clause limitations extend beyond barring discrimination (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)), the discrimination standards developed under the Commerce Clause provide a proper upper bound on the reach of (b)(4).

Those standards were summarized in *Amerada Hess Corp. v. New Jersey Div. of Taxation*, 490 U.S. 66, 75 (1989), where the Court explained that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." The first two categories represent two different ways of proving "disparate treatment," *i.e.*, deliberate targeting for disadvantageous treatment.<sup>17</sup> The third, "discriminatory effect," category is harder to define, but it is clearly a narrow one and, in the end, not radically different from or expansive of the bar on deliberate discrimination.<sup>18</sup> A state tax is in-

<sup>16</sup> The Court explained in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984): "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, 'when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.'" (quoting *South Carolina State Highway Dep't v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 n.2 (1938)).

<sup>17</sup> See *Hazen Paper Co. v. Biggins*, 113 S. Ct. at 1706; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-66 (1977).

<sup>18</sup> Even in the most well-established context where a "disparate impact" standard has been adopted—Title VII, 42 U.S.C. § 2000e-2—the standard has narrowly condemned only those practices not appropriately justified independently of the forbidden basis. See 42 U.S.C. § 2000e-2(k); *cf. Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (disparate impact standard condemns practices "functionally equivalent to intentional discrimination").

valid under this prong of Commerce Clause analysis only if, regardless of any inability to identify the legislature's actual motive, a facially neutral measure has a dramatically disparate impact on out-of-state businesses with no plausible independent justification.<sup>19</sup>

The Court repeatedly has made clear that disparate effects are not alone enough for invalidity. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (no violation even though "tax burden is borne primarily by out-of-state consumers"); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-29 (1978).<sup>20</sup> What is needed to state a claim, as *Amerada Hess* makes clear, is the absence of any neutral basis to justify or explain the disparate effect. Thus, the Court in *Amerada Hess* rejected a discriminatory-effect argument precisely because the challenged tax's differential impact on out-of-state businesses was explainable in-

<sup>19</sup> Commentators have noted that the Court has focused on "discriminatory effects" as the basis for invalidating state measures under the Commerce Clause in only a few cases, and then only when the circumstances—the inherently disparate operation of a seemingly neutral classification—gave rise to a suspicion of improper motive, in the absence of any plausible legitimate independent justification for the measure. See Smith, *Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986), cited in *Amerada Hess*, 490 U.S. at 75; Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986), cited in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987); L. Tribe, *American Constitutional Law* § 6-17, at 453-58 (2d ed. 1988) ("claims of discriminatory taxation are judged primarily on the basis of the facial characteristics of the taxing statutes," but a few neutral measures with disparate impact have been invalidated where they lacked "sufficient justification").

<sup>20</sup> Cf. *Leathers v. Medlock*, 111 S. Ct. 1438, 1446, 1447 (1991) ("a differential burden on speakers is insufficient by itself to raise First Amendment concerns"; "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas").



dependently of their out-of-state character: the disparity resulted "solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78. The same standard is reflected in the two cases cited by *Amerada Hess* (490 U.S. at 76) for the "effects" category: *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), which found discrimination where there was "no other reason than the location of its business" for a tax measure that disfavored in-state over out-of-state business (483 U.S. at 286 (emphasis added)); and *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963), which turned on "the need for equal treatment of taxpayers who *can be distinguished only on the basis of residence*" (*Williams v. Vermont*, 472 U.S. 14, 23 n.7 (1985) (emphasis added)). In brief, a challenged state measure, neutral on its face and not actually motivated by local favoritism, does not unconstitutionally discriminate against interstate commerce unless any disparate effect on out-of-state commerce is inexplicable on a plausible legitimate independent basis.<sup>21</sup>

This Court has adopted the same principle in its decisions applying equal protection scrutiny to state taxes challenged as discriminating against out-of-state taxpayers. "A State may not treat those within its borders unequally *solely on the basis of* their different residences or States of incorporation." *Williams v. Vermont*, 472 U.S. at 23 (emphasis added); *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968); *Wheeling Steel*

<sup>21</sup> The Court has said that even facially discriminatory measures escape condemnation under the anti-discrimination bar of the Commerce Clause—indeed, may be viewed as not really discriminatory—if they are justified by neutral state policies. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); see *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (state goals "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

*Corp. v. Glander*, 337 U.S. 562, 571-72 (1949).<sup>22</sup> That the same standard appears in another established doctrine aimed at state exploitation of unrepresented outsiders reinforces the appropriateness of using (at most) an "independent justification" standard under Section 11503 (b)(4).<sup>23</sup>

Application of this standard, moreover, must respect this Court's frequently repeated insistence that "in structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams v. Vermont*, 472 U.S. at 22 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). See *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992); *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). Legislatures may pursue a host of legitimate interests through their tax schemes, including the promotion of particular industries or the alleviation of administrative or other burdens from particular tax-

<sup>22</sup> The Court in *Williams* explicitly drew on the Commerce Clause principles stated in *Halliburton Oil Well Co.*, *supra*. See 472 U.S. at 23 & n.7.

<sup>23</sup> Congress wrote subsections (b)(1) through (b)(3) in order to provide an objective, almost mechanical, test for discriminatory property taxation, in place of the more flexible standards that even then applied to the Equal Protection Clause and, since *Complete Auto*, apply to the Commerce Clause. See S. Rep. 630, *supra*, at 6-7. There is no indication, however, that (b)(4), with its highly general language, was written to go beyond the substantive constitutional discrimination standards. The principal function of (b)(4), then, is to enable railroads to come directly to federal court under subsection (c)'s lifting of the bar of the Tax Injunction Act. This "procedural aspect" of the anti-discrimination provision of the 4R Act was plainly a critical part of Congress's design, independently of any change of substantive standards. See S. Rep. 630, *supra*, at 1; *id.* at 1-15; S. Conf. Rep. 585, *supra*, at 166-67.

payers. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512-15 (1937); see *Lehnhausen*, 410 U.S. at 359-65; *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 367-69 (1940). This Court has always given legislatures a wide berth in drawing tax classifications: the Court "has been reluctant to interfere with legislative policy decisions in this area" (*Williams*, 472 U.S. at 22) and has been "especially deferential" in reviewing the rational basis for legislative classifications apparently designed to further legitimate interests (*Nordlinger*, 112 S. Ct. at 2332). This leeway for States—rooted in tradition, federalism, and practical necessity—should apply in full to the determination under Section 11503(b)(4) of whether legitimate state interests, independent of the disfavoring of railroads, can justify a State's tax classifications.

Under the foregoing standards, Oregon's exemption scheme must be readily upheld against respondents' challenge (which the parties agreed would be decided on the stipulated record, Pet. App. 22a). None of the exemptions even mentions, much less facially discriminates against, rail carriers. Nor have respondents presented any reason even to suspect that these exemptions, individually or collectively, were enacted in order to disadvantage railroads. Indeed, each of them—like virtually any exemption for a particular business or piece of property—on its face serves an obvious state policy of affirmatively encouraging, or relieving from burdens, the beneficiary of the exemption. Each such affirmative state policy, legitimate in itself, has nothing to do with the targeting of railroads.

This is not a case, finally, where the State has found "neutral" ways to exempt all non-railroad taxpayers or otherwise, by direct or indirect means, effectively singled out rail carriers as the only remaining taxpayers. Such a situation might well lend itself to an inference of discriminatory intent; it might even more readily lend itself to a finding that, regardless of actual motive, the resulting

singling out of railroads had no justification based on any legitimate state interest, but served only to disfavor railroads. Where, however, as in this case, railroads are in the company of many other taxpayers, in-state as well as out-of-state, who do not qualify for exemptions, there is no basis for such an inference or finding. In these circumstances, Congress's concern with legislative exploitation of unrepresented interests (*Western Air Lines, Inc.*, 480 U.S. at 131) is not present.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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12  
NO. 92-74

Supreme Court, U.S.  
JUL 15 1993

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
RICHARD A. MUNN, in his Capacity as Director  
of the Department of Revenue of the State of Oregon,

*Petitioner,*

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL ELECTRIC  
RAILCAR SERVICES CORPORATION; PULLMAN LEASING  
COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER  
TRAIN COMPANY; UNION TANK CAR COMPANY,

*Respondents.*

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**BRIEF OF THE STATES OF WASHINGTON,  
ARIZONA, CALIFORNIA, FLORIDA, IDAHO,  
KENTUCKY, MINNESOTA, MISSISSIPPI,  
MISSOURI, MONTANA, NEBRASKA, NEW  
MEXICO, NEW YORK, NORTH CAROLINA, NORTH  
DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA,  
TENNESSEE, UTAH, VERMONT, VIRGINIA,  
WISCONSIN AND WYOMING AS AMICI CURIAE IN  
SUPPORT OF PETITIONER**

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**QUESTIONS PRESENTED**

(1) Whether a state imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the state's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.



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## INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amicus curiae* in support of the position of the petitioner, Oregon, before this Court, which seeks the reversal and remand of the judgment of the United States Court of Appeals for the Ninth Circuit in *ACF Indus., Inc. v. Department of Rev.*, 961 F.2d 813 (9th Cir. 1992). The amici States fall within the jurisdictional boundaries of several of the federal circuits. This brief is submitted on behalf of Washington, Arizona, California, Florida, Idaho, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming by their attorneys general. Accordingly, consent to its filing is not required. SUP. CT. R. 37.5.

The principal issue before the Court is whether a state must be deemed to have imposed a discriminatory tax upon railroad property in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act") when the state's laws exempt from property taxes any class of property of a type not owned by a railroad.

Railroads and carlines carry on extensive transportation operations within the amici States which represent a significant presence in terms of property and personnel and a concomitant obligation on the part of state and local governments to provide essential services.<sup>1</sup> Ad valorem property taxes are an integral part of the revenue systems of

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<sup>1</sup>For 1991 railroad net investment in road and equipment nationwide was reported to exceed \$48 billion. For Class I line-haul railroads operating railroad mileage of 62,238 miles and railroad employment of 106,653 persons were assignable to the amici States. AMERICAN ASSOCIATION OF RAILROADS, RAILROAD FACTS, 42, 44, 57 (1992 ed.). Class I railroads, while comprising 2% of the nation's railroads, in 1991 generated 91% of freight revenues and accounted for 89% of railroad employment and 75% of mileage operated. *Id.*, at 3.

these States.<sup>2</sup> Like Oregon, the amici States have traditionally allowed property tax exemptions to encourage economic development within their borders, some of which will be enjoyed by railroads and carlines as well as other businesses. Additional exemptions will still be available to railroads and carlines (as well as to other businesses) but may not be taken advantage of by them in the conduct of rail transportation.

Were the decision below to be allowed to stand and to be adopted by other circuits, the amici States would then be put to an election Congress could never have intended: either to confine exemptions to the types of property owned by railroads, and then only in proportion to the benefits enjoyed by the railroads from such exemptions, or to forego altogether collection of property taxes from railroads. In this regard, the amici States take strong exception to the remedy afforded by the Ninth Circuit below, and concur in the brief submitted by Oregon, as petitioner, on the matter. Of further concern is the potential for application of the principles of the Ninth Circuit's decision regarding exemptions, not only to property taxes but to other statutory sources of revenue looked to by the states.

A broader concern of the amici States, and all states, is highlighted by the treatment given by the Ninth Circuit to the threshold issue in this case—whether Congress ever intended to constrict the states' exercise of their taxing pow-

<sup>2</sup>For the fiscal year ended June 30, 1991, property taxes constituted 75% of all tax revenues collected nationwide for the support of local (as opposed to state) governments and other taxing districts. Property tax collections in the amici States during the same period for both state and local governments approximated \$81.6 billion. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, GOVERNMENT FINANCES: 1990-91 (PRELIMINARY REPORT), at 1. Information taken from ICC compilations for 1991 indicate that Class I line-haul railroads paid property taxes in the amount of \$334,355,000. OFFICE OF ECONOMICS, INTERSTATE COMMERCE COMM'N, TRANSPORT STATISTICS IN THE U.S.: RAILROAD COMPANIES AND MOTOR CARRIER SUBJECT TO THE INTERSTATE COMMERCE ACT, Part I, Table 5, at 10 (Dec. 31, 1991).

ers to the degree determined by the lower court. An accelerating trend of federal pre-emption of state regulatory and taxing powers, even as additional responsibilities are shifted from the national government, has been well-documented.<sup>3</sup> In this current climate of federalism, the states should not be made to suffer the consequences of prohibitions on the use of their powers, otherwise sovereign, that were never intended.

### SUMMARY OF ARGUMENT

1. In 1961, Congress began its inquiry into the matter of tax discrimination against railroads by the states, which culminated in the Railroad Revitalization and Regulatory Reform Act of 1976. From the outset and in the earlier years of this period, Congress focused upon the issues of disparate property assessment practices and differential tax rates in state ad valorem property taxation. This was the genesis of the language now found in 49 U.S.C. § 11503(b)(1)-(3).

2. Toward the end of its 15-year trek through Congress, the House appended language to the 4R Act, eventually codified in 49 U.S.C. § 11503(b)(4), which, in general terms, prohibits states and their subdivisions from imposing "another tax" that discriminates against rail carriers. Subsection (b)(4)'s reference to "another tax" must be considered in context with the explicit language in the immediately preceding subsections of the statute, which are directed only to ad valorem property taxes and the features thereof that constitute statutory discrimination, but in which Congress clearly accommodated the states' interest in granting property tax exemptions.

3. The plain and ordinary meaning of the "another tax" provision cannot be read to apply to property taxes, as

<sup>3</sup>See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PRE-EMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES (1992).



the Ninth Circuit interpreted subsection (b)(4), to render discriminatory property tax exemptions which, traditionally, are an integral part of state property tax systems. While resort to legislative history is not essential to the Court's decision, the history fully supports the conclusion that only taxes *other* than property taxes are the subject of § 11503(b)(4). There is accordingly no need for this Court to consider the test for discrimination or the scope of its remedy as would be required if such other taxes were under review.

4. In refusing to apply the plain language of the statutory provision, the Ninth Circuit also chose to ignore recognized principles of construction this Court has continually applied to avoid an unintended imbalance between federal interests and traditional state prerogatives, *e.g.*, discretion in the exercise of the taxing power. If the language of § 11503, fairly interpreted, does not remedy forms of discrimination alleged by the rail industry to exist, that constituency should not receive from the courts relief for a problem which Congress either did not view as a concern or impliedly chose not to grant in the legislative process.

## ARGUMENT

### I. The Term "Another Tax" Plainly Requires That Section 11503(b)(4) Only Be Applied to Taxes Different Than the Tax Addressed Before—*i.e.*, Property Taxes.

Section 11503(b)(4) of the 4R Act follows in sequence subsections (b)(1)-(3), which proscribe discriminatory property taxes,<sup>4</sup> and prohibits the imposition of "another

<sup>4</sup>Subsection (b)(1) addresses property tax assessments; subsection (b)(2) addresses the levy and collection of property taxes; and subsection (b)(3) addresses property tax rates.

tax" that discriminates against a rail carrier.<sup>5</sup> "[T]he language employed by Congress" is the starting point in all cases of statutory construction and this Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). As used in subsection (b)(4), "another tax" is limited to a tax different or distinct from the *ad valorem* property tax that is governed by the assessment ratio, collection, levy and tax rate restrictions of § 11503(b)(1)-(3).<sup>6</sup>

As used in the context of § 11503(b), "another" means "different or distinct from the one first named or considered[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (1971). Similarly, as used in the context of § 306(1)(d), "other" means different or distinct. WEBSTER'S

<sup>5</sup>49 U.S.C. § 11503 is the recodification of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54, first codified at 49 U.S.C. § 26c (1976). The original Act was recodified in 1978. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The text of both § 11503 and § 306 is provided in the Appendix.

The language of the recodification differs slightly from the original language of § 306. For example, § 306(1)(d), the provision corresponding to § 11503(b)(4), prohibited "[t]he imposition of *any other* tax which results in discriminatory treatment of a common carrier by railroad" (emphasis added). Such changes "may not be construed as making a substantive change in the laws replaced." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Therefore, § 11503(b)(4) should be interpreted in light of the language of § 306(1)(d), and the two versions of the statute should be harmonized to the extent possible, with any unavoidable conflicts resolved in favor of the original language. See, *e.g.*, *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 523-24 n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

<sup>6</sup>This is the natural manner in which the phrases "another tax" or "other tax" ordinarily are used: to refer to a *different* tax than mentioned earlier. See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 128, 132, 133, 134 (1987) ("In order to be an 'in lieu tax,' the court reasoned, the flight property tax must be a substitute for *another* tax on flight property. . . . [T]he phrase 'in lieu tax' restricts the protection of



THIRD NEW INTERNATIONAL DICTIONARY 1598 (1971) defines "other" as "not being the one (as of two or more) first mentioned or of primary concern : . . . being the ones distinct from the one or those first mentioned or understood . . . not the same : DIFFERENT . . ." BLACK'S LAW DICTIONARY 1253 (4th ed. 1968) defines "other" as "[d]ifferent or distinct from that already mentioned; additional or further."<sup>7</sup>

In the context of § 11503(b)(4), "tax" means a legislative enactment imposing on persons a pecuniary burden to raise revenues for the general support of government. *See Union*

§ 1513(d)(3) to property taxes applied to the exclusion of *any other tax* on the property, in other words, to taxes applied in lieu of *any other possible property tax*. . . . The South Dakota Airline Flight Property Tax establishes a method of taxing a particular type of property to the exclusion of *any other tax* on that property. . . . Appellants advocate the position taken by the Supreme Court of South Dakota, that in order to be exempted under this provision a tax must take the place of *another tax* that historically had been applied to the airline property. The fact that a property tax is applied to the exclusion of *all other property taxes* is immaterial, appellants assert, unless some past tax was actually replaced by the present tax. . . . Why a State that has consistently chosen to levy, to the exclusion of *all other property taxes*, a tax utilized wholly for aeronautical purposes should be penalized for its consistency is unexplained. . . . Appellants do not suggest—and have no basis upon which to suggest—that in order to be an 'in lieu tax' under § 1513(d)(3) the airline flight property tax must have replaced *some other tax* by the effective date of the federal provision. If one tax must replace *another*, therefore, the replacement could take place at any time. . . . This exercise of replacing one tax with *another*, while contributing somewhat to a state legislature's workload, would contribute nothing to the policies of the Airport and Airline Improvement Act. . . . [Section] 1513(d)(3) exempts from the antidiscrimination provisions of § 1513(d)(1) a tax on airline flight property, applied to the exclusion of *any other possible tax* on that property, the proceeds of which are wholly utilized for airport and aeronautical purposes" (emphasis added).

<sup>7</sup>Reliance on dictionary definitions is not uncommon in this Court's opinions. *See, e.g., Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993); *see also id.*, at 1547 (Blackman, J., dissenting).

*Pac. R.R. v. Public Util. Comm'n*, 899 F.2d 854, 858-59 (9th Cir. 1990); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2345 (1971) (A "tax" is a "pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes : a forced contribution of wealth to meet the public needs of a government"); BLACK'S LAW DICTIONARY 1628 (4th ed. 1968) (A "tax" is "[a] pecuniary burden laid upon individuals or property to support the government, and is a payment exacted by legislative authority").

Construing subsection (b)(4) as it is plainly worded recognizes that Congress, in addition to the property tax prohibitions set out in subsections (b)(1)-(3), intended to forbid discriminatory taxes different or distinct from the property tax it had already addressed.<sup>8</sup> This plain reading of § 11503(b) comports with the Court's direction in *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) that the language of § 11503 must "be regarded as conclusive" where the terms of the statute are unambiguous. *Id.*, at 461.

When Congress has used the words "other" and "taxes" together in other statutes, it has used these terms to mean different taxes and not, as argued by railroads and carlines, different tax provisions. For example, the Airport Development Acceleration Act of 1973 prohibits states from levying or collecting "a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom[.]" 49 U.S.C. § 1513(a). The Act goes on to provide, however, that "nothing in this

<sup>8</sup>*See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991) in which the Seventh Circuit, in a case involving an occupational tax, concluded that subsection (b)(4) applies to *another* type of tax rather than a property tax.

section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services[.]” 49 U.S.C. § 1513(b)(emphasis added). See *Aloha Airlines, Inc. v. Director of Tax’n*, 464 U.S. 7, 12 n.6 (1983)(“While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipt taxes and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice”).

The conclusion that Congress employed the word “other” in subsection (b)(4) to refer to taxes different than property taxes also promotes the rule of construction that the general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957)(“However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment”)(internal quotations omitted).<sup>9</sup>

<sup>9</sup>See also *Cami v. Central Victoria, Ltd.*, 268 U.S. 469 (1925) in which the Court construed a statute containing the phrase “any other impost, excise or tax” in accord with the rule that general statutory language should not be construed to defeat specific statutory language:

[I]t is difficult for us to believe that in one paragraph the latter Act gave power to tax up to a specified maximum and in another a general power limited only by the other principles of taxation. Therefore when in § 49(f) the later Act allows “any other impost, excise or tax” we think it must be taken to mean any tax on other objects of taxation, not any other tax on those for which a limit already definitely is prescribed.

*Id.*, at 471.

In § 11503, subsections (b)(1)-(3) specifically address discriminatory property taxes and reference the same specific comparison class of “commercial and industrial property.” In stark contrast, subsection (b)(4) is indisputably general. In subsection (b)(4), Congress has said that “impos[ing] another tax that discriminates” is a prohibited act that “discriminate[s] against interstate commerce[.]” See 49 U.S.C. § 11503(b) and (b)(4). Congress could not have been more general in subsection (b)(4) than to have prohibited as discriminatory “another tax that discriminates.” Accordingly, since subsections (b)(1)-(3) specifically deal with property taxes, the broad general language of subsection (b)(4) should not be deemed to embrace the same subject matter.

In *Burlington N. R.R. v. Oklahoma Tax Comm’n*, *supra*, this Court rejected a proposed interpretation of the 4R Act that “depends upon the addition of words to a statutory provision which is complete as it stands” and that “would require amendment rather than construction of the statute[.]” 481 U.S., at 463. The Court should similarly reject a proposed interpretation of § 11503(b)(4) that depends upon the subtraction of the word “another” from the statutory provision, thus requiring judicial amendment of § 11503 rather than its construction. See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992)(“[A] statute must, if possible, be construed in such fashion that every word has some operative effect”). Accordingly, this Court should hold that by its plain language subsection (b)(4) does not address claims involving property taxes.

## II. The Interest of The States in Adapting Their Tax Systems to Particular Needs Warrants a Careful Scrutiny of Federal Statutes Claimed to Have Substantially Limited State Options.

As we have shown, subsection (b)(4) to 49 U.S.C. § 11503 concludes the listing of prohibited acts by a state,



which are deemed to unreasonably burden and discriminate against interstate commerce, by prohibiting the imposition of "another tax" that discriminates against a rail carrier. This final limitation follows those in the preceding subsections directed at ad valorem property tax actions, in the definition of which, Congress, through careful draftsmanship, allowed states to exempt property from such taxes. Thus, in urging that this juxtaposition of the subsections be ignored, respondents would have this Court disregard also the relevant principles of statutory construction, including those to be applied when the bounds of Congress' intervention into the realm of traditional state prerogatives must be set.

**A. The Court Need Not Proceed Beyond the Unambiguous Language of the Statutory Phrase, as a Principle of Construction, to Resolve the Issue in This Case.**

The language of § 11503 is pre-emptive in nature. That fact alone, in respondents' view, permits an expansive construction of the term "another tax" in the face of its plain meaning on the theory that remedial legislation is involved. Resp. Brief in Opp. to Pet. for Cert., at 6.<sup>10</sup> However, the degree of pre-emption plainly remains for the courts to fathom. The result of such inquiry leads inevitably to the conclusion that property taxes are not comprehended by subsection (b)(4), whether the analysis is confined simply to the "text, structure, purposes, and subject matter of the statutes involved[.]" or abetted by a stricter construction of pre-emptive language when the federal-state balance is involved. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608,

<sup>10</sup>Recognizing the existence of a countervailing requirement of clear and manifest intent for Congressional pre-emption of state powers, respondents argue, facilely, that this principle is absent from the case, because "Congress has itself struck the balance." The nature of that balance is, of course, the issue now before the Court.

2632 (1992)(Scalia, J., concurring in the judgment in part and dissenting in part).

As the Court has stated, as recently as its past Term: If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

*CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993).<sup>11</sup>

**B. Well-Established Pre-Emption Analysis Requires Clear Evidence of Congressional Purpose to Avoid Unintended Impingement on State Prerogatives.**

Were the plain wording principle of construction assumed *arguendo* to be inadequate for the interpretive task, then the general principles of pre-emption analysis consistently employed by this Court would become directly relevant. Unquestionably, when state statutes conflict with, or frustrate, federal law, the Supremacy Clause commands that they give way. However, this Court has consistently required of Congress a "clear and manifest purpose" in testing for pre-emption and its scope to avoid "unintended encroachment on the authority of the States[.]" *CSX Transp., Inc. v. Easterwood*, 113 S. Ct., at 1737. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

In *Cipollone*, *supra*, this Court stated that "[c]onsideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by [a] Federal Act unless

<sup>11</sup>As demonstrated, *infra*, at 26-27, a straight-forward construction of the statutory language at issue is neither so absurd nor illogical that the Court should reject its plain meaning. See, e.g., *Conroy v. Anishkoff*, 113 S. Ct. 1562, 1566 (1993).



that is the clear and manifest purpose of Congress." 112 S. Ct., at 2617 (internal quotations omitted). This Court further reminded that the strong presumption against pre-emption requires a fair but narrow construction of the statutory language being considered. *Id.*, at 2621; *see also id.*, at 2626 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part)("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. . . . We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language").

In its pre-emption inquiry, the Court has clearly and properly accorded the states' historic taxing prerogatives the same recognition it has extended to the application of their police powers. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986). Long ago this Court underscored the fundamental nature of the states' taxing power. *Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873) ("And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence"); *Bull v. United States*, 295 U.S. 247, 259 (1935)("[T]axes are the life-blood of government").<sup>12</sup>

There is nothing explicit or sufficiently implied in the particular prohibition legislated in § 11503(b)(4) to justify the conclusion that Congress has clearly and manifestly

<sup>12</sup>*See also Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959) where this Court cautioned against subjecting the taxing power of a state to "intolerable supervision." The caution the Court employs in defining the reach of Congressional action so as not to "upset the usual constitutional balance of federal and state powers" is not unlike the care it exhibits in its Tenth Amendment analysis. *See New York v. United States*, 112 S. Ct. 2408, 2425 (1992).

foreclosed the states from tailoring their property tax systems other than in the manner elsewhere provided in the statute.

### **C. The Limited Jurisdictional Exception Drawn by Section 11503 Itself Counsels Against a Broad Pre-Emptive Reading of Its Provisions.**

Section 11503 is a limited exception to the general Congressional policy of noninterference with state tax systems. The Tax Injunction Act, 28 U.S.C. § 1341, provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

So pervasive is the policy behind the Tax Injunction Act—that federal courts should not interfere in state tax matters—that exceptions to the Act should be read narrowly.

The strength of the policy behind the Tax Injunction Act has been acknowledged by this Court on several occasions. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) ("[T]he statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations"); *California v. Grace Brethren Church*, 457 U.S. 393, 409-10 (1982) (The states generally must be left free to fashion a coherent system of revenue collection or face fiscal chaos). *See also Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

The principles of comity which inhere in the Court's pre-emption analysis have precluded exceptions to the Tax Injunction Act, even in the face, for example, of the general statutory grant of power to a federal court to enjoin unconstitutional state practices in 42 U.S.C. § 1983. In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) this Court barred taxpayer damage actions in federal courts under § 1983 to redress the allegedly unconstitutional administration of a state tax system.

Of course, § 11503(c) expressly states that despite the Tax Injunction Act, the district courts may grant the relief specified in that section.<sup>13</sup> However, when this Court has held that the important right of § 1983 access to federal courts to challenge a state's unconstitutional practices must yield to the policy of the Tax Injunction Act, then any exception to the Act should be construed narrowly, not expansively. See *California v. Grace Brethren Church*, 457 U.S., at 413 ("In order to accommodate these concerns and to be faithful to the congressional intent 'to limit drastically' federal-court interference with state tax systems, we must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act"); *Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991) ("While § [11503] was passed as an express exception to the policy of non-interference, we are not inclined to disregard this general policy in areas where § [11503] does not plainly authorize such an exception"), *cert. denied*, 112 S. Ct. 1577 (1992).

### III. The Legislative History Supports the Plain Language of Section 11503(b)(4).

As demonstrated in the foregoing sections, there is ample basis for the Court to dispose of the interpretive issue in this case through application of the plain meaning rule of construction, without invoking its established pre-emption analysis. Whatever the role of these two canons of construction, the conclusion is compelled that in § 11503(b)(4) Congress did not intend to address the question of property taxes. While recourse to legislative history should not be necessary, the subject of property taxes was given close at-

<sup>13</sup>Section 11503(c) specifically provides: "Notwithstanding section 1341 of title 28 . . . a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States to prevent a violation of subsection (b) of this section."

tention by Congress, but solely in the drafting of other subsections of the statute.

As discussed in Section I of this argument, the unambiguous language of § 11503(b)(4) plainly applies only to taxes *other* than ad valorem property taxes. This reading of the statute's clear language is consistent with the 4R Act's legislative history which confirms that Congress did not intend to address property tax discrimination in subsection (b)(4).<sup>14</sup> In fact, the legislative history strongly suggests that Congress intended the prohibition of subsection (b)(4) to be much more limited than revealed by the language used in the subsection. Rather than broadly applying to all other non-property taxes, it appears that Congress intended subsection (b)(4) to reach only discriminatory taxes imposed "in lieu of" property taxes.<sup>15</sup>

Although the genesis of some of the 4R Act's tax provisions date back to 1961,<sup>16</sup> the "any other tax" provision does

<sup>14</sup>Given the unambiguous statutory command found in subsection (b)(4), resort to legislative history is not necessary. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S., at 461. Should the Court nonetheless look behind the plain language of subsection (b)(4), it will find the legislative history regarding subsection (b)(4) to be sparse. Indeed, § 11503 "as one small part of the massive [4R Act], actually received scant attention in the legislative history produced by the 94th Congress." *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983). However, as demonstrated in this section of the argument, what legislative history there is does not reveal any Congressional intent whatsoever to address through subsection (b)(4) the property tax exemption claim raised by the plaintiff carlines against Oregon.

<sup>15</sup>This Court, however, needs only to decide whether subsection (b)(4) applies to property taxes. Because the plaintiff carlines' subsection (b)(4) claim is based on alleged personal property tax exemption discrimination only, it is not necessary for the Court in this case to determine what *other* taxes subsection (b)(4) may apply to.

<sup>16</sup>See *National Transportation Policy, Report of the Committee on Commerce, United States Senate by its Special Study Group on Transportation Policies in the United States*, No. 87-445, 87th Cong., 1st Sess. (1961).



not appear in the legislative record until February 19, 1974, about two years before enactment of the legislation. The relevant portion of that House bill, H.R. 12891, 93d Cong., 2d Sess. (1974), provided:

(2) Notwithstanding the provisions of section 202(b) of this Act, the following actions by any State, or subdivision or agency thereof, whether taken pursuant to a constitutional provision, statute, administrative order, or practice, or otherwise, constitute an unreasonable and unjust discrimination against, and undue burden upon interstate commerce and are prohibited:

...  
(d) the imposition of any other tax which results in discriminatory treatment of a carrier subject to part I or part III of the Interstate Commerce Act.

*Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694 and S. 1149 Before the Committee on Interstate and Foreign Commerce and the Subcommittee on Transportation and Aeronautics, No. 93-85, 93d Cong., 2d Sess. 24 (1974)(emphasis added).*

After the "any other tax" provision appeared in H.R. 12891, the same or a similar provision appeared in most other House precursors of the 4R Act until its enactment. See, e.g., H.R. 5385, 93d Cong., 2d Sess. (1974); H.R. 6351, 94th Cong., 1st Sess. (1975); H.R. 7681, 94th Cong., 1st Sess. (1975); H.R. 10979, 94th Cong., 1st Sess. (1975). Congress' intent in adding the "any other tax" provision was not explained in the legislative record at the time the provision first appeared. However, the provision was soon referred to as the "so-called 'in-lieu tax'" provision. See *Surface Transportation Act of 1974: Report on H.R. 5385 by the Committee on Interstate and Foreign Commerce, Together With Additional and Minority Views, No. 93-1381, 93d Cong., 2d Sess. 35-36 (1974).*

In the Senate, the "any other tax" provision appeared later than in the House.<sup>17</sup> In fact, as late as October 1975, some of the Senate's earlier versions of the 4R Act did not contain an "any other tax" provision. See, e.g., *Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on Legislation Relating to Rail Passenger Service, No. 94-31, 94th Cong., 1st Sess., Part 5, at 1553 (1975)(hereinafter "Hearings").* Consequently, before the Senate Subcommittee on Surface Transportation in October 1975, Stephen Ailes, the President of the Association of American Railroads, urged the Senate to include such a provision to protect railroads against the imposition of discriminatory taxes "in lieu of" property taxes:

We suggest that the bill should be amended by adding a fourth provision, namely, one against taxes that are in lieu of discriminatory property taxes that are covered in the first three prohibitions listed above.

*Hearings, at 1837.*

Stuart Johnson, on behalf of the New York Dock Railway, also testified in favor of the "any other tax" provision. He stated that the provision was necessary to protect the New York Dock Railway against a New York City gross receipts tax applicable to public utilities, a tax imposed in lieu of a property tax. *Hearings, at 1883.* The Senate apparently heeded these requests to protect railroads against discriminatory "in-lieu" taxes because the "any other tax" provision found its way into the final Senate bill that became the 4R Act. See S. 2718, 94th Cong., 1st Sess. (1975).

In the House in late 1974, after the addition of the "any other tax" provision, Representative Long of Louisiana raised his concern about the proposed legislation's application to certain property tax exemptions provided to various industries in Louisiana to encourage economic development. The reported colloquy between Representative Long

<sup>17</sup>The "any other tax" provision first appeared in a Senate bill on June 5, 1975. See S. 1876, 94th Cong., 1st Sess. (1975).



and several major proponents of the legislation indicates that the proponents thought its limitations on state taxation were directed only to "certain abuses" other than exemptions:

Mr. LONG of Louisiana. . . .

As we know, a number of States, and particularly some of the Southern States, one of which is my own State of Louisiana, granted exemptions from ad valorem taxes to various industries on a temporary basis so that that State could build an industrial base. I have read over title II. I do not think it possible, but I wanted the views of these three gentlemen: Could it be possibly interpreted as precluding the special property tax incentives such as the one which has been given by the State of Louisiana to a new industry for a limited period of time, in order to encourage economic development within the State?

Mr. STAGGERS [the chief sponsor of the 4R Act]. In response to the gentleman from Louisiana, I can say that we do not touch on that in any way or prohibit it. The only thing we touched on was discriminatory transportation. I know that there are certain States that will give industries that come in and settle there certain tax benefits. We do not go into that at all. We certainly have no intention of banning that practice.

. . .

Mr. ADAMS [of Washington]. . . .

I want to assure the gentleman . . . that this provision is not one that would change or affect the practice that the gentleman from Louisiana has outlined. The purpose of this section is to provide that the States simply plug the transportation industry into their tax system, as they do other industry, so that if we have a rate for commercial and industrial property, this rate that we generally apply in the State applies to transportation property with a plus or minus 5 percent.

In other words, we can charge them 5 percent more. *It is directed only at certain abuses that have grown up in the country where a particular State or county, because it had somebody who was not a local citizen and did not vote there but was just passing*

*through as an interstate carrier, would tax them more heavily than their local people because they did not vote.*

I think the gentleman can be assured that this provision would not affect these specific exemption-type industrial development programs that he has outlined.

. . .

Mr. KUYKENDALL [of Tennessee]. . . . I would concur with the statements of the chairman and the gentleman from Washington. It is my understanding . . . that such arrangements made in any State do not change the tax structure of that individual locality. They are exceptions in the structure. We are referring only to the structure in this legislation.

120 CONG. REC. 38,734 (1974)(emphasis added).

A House report from December 1975 (shortly before passage of the 4R Act), discusses the intent of the soon-to-be enacted legislation. This report directly expresses that its purpose was to end "discriminatory property and 'in lieu' taxation":

Specifically, this section amends Part I of the Interstate Commerce Act to include a new section which would make unlawful certain state taxation activities, or actions by any subdivision or agency of a state. These actions include: (1) assessment of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other commercial and industrial property (in the assessment jurisdiction) bears to the true market value of all other commercial and industrial property[;] (2) the collection of any tax on the portion of such assessment; (3) the collection of any ad valorem property tax on such transportation property at a higher tax rate than the tax rate generally applicable to commercial and industrial property in the taxing district; (4) *the imposition of any other tax which discriminates against a common or contract carrier regulated by the Interstate Commerce Act (the so-called "in-lieu tax").*

. . .

The Committee found that railroads are over-taxed by at least \$50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, *the Committee believes discriminatory property and "in lieu" taxation should be ended.*

*Railroad Revitalization and Regulatory Reform Act of 1975: Report of the Committee on Interstate and Foreign Commerce on H.R. 10979, Together with Supplemental and Dissenting Views*, No. 94-725, 94th Cong., 1st Sess. 76-78 (1975)(emphasis added).<sup>18</sup>

The final part of the legislative record providing insight about the purpose of the "any other tax" provision is found in *Railroad Revitalization and Regulatory Reform Act of 1976: Report of the Committee on Conference on S. 2718*, No. 94-595, 94th Cong., 2d Sess. 165-66 (1976), which discusses the purpose of the state tax discrimination provisions in H.R. 10979<sup>19</sup> as follows:

Part I of the Interstate Commerce Act was amended to include a new section making unlawful ad valorem State or State subdivision taxation activities. Such prohibited tax practices included (1) overvaluation; (2) collection of an unlawful tax; (3) collection of any ad valorem property tax at a higher rate than the

<sup>18</sup>In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987) this Court cited from these same pages of the 4R Act's legislative record in discussing the phrase "in lieu tax": "This Report [of the Committee on Interstate and Foreign Commerce on H.R. 10979] used the phrase 'in lieu tax' to describe special taxes on common carriers that operate differently from the generally applicable property tax schemes. H. R. Rep. No. 94-725, pp. 77, 78 (1975)." *Id.*, at 130, n.\* (emphasis added).

<sup>19</sup>The text of S. 2718 before the Committee on Conference, with regard to the "any other tax" provision, was virtually identical and substantively the same as the text of the "any other tax" provision in H.R. 10979.

tax rate generally applicable to commercial and industrial property in the taxing district; or (4) *the imposition of a discriminatory "in-lieu tax"*.

(emphasis added).

In sum, review of the legislative history reveals that every explanatory reference to the "any other tax" provision in the record is to restrictions on "in lieu taxes." No reference or discussion in the legislative history indicates that subsection (b)(4) was intended to address personal property tax exemptions. Thus, although the legislative history is sparse, what legislative history there is supports a plain reading of the unambiguous language of § 11503(b) and the conclusion that Congress did not intend through subsection (b)(4) to address claims alleging property tax discrimination.

We would note by way of conclusion that the decision below demonstrates a further lack of precision by the lower courts in applying the careful distinctions in the language Congress has utilized. The Ninth Circuit's opinion broadly suggests *any* non-railroad taxpayer may claim discrimination under subsection (b)(4) merely by demonstrating that a tax to which it is subject has some "indirect effect" on a rail carrier. *ACF Indus., Inc. v. Department of Rev.*, 961 F.2d 813, 817-18 n.2 (9th Cir. 1992).<sup>20</sup>

<sup>20</sup>However, subsection (b)(4) prohibits the imposition of *another* tax that discriminates against a "rail carrier." In clear contrast, subsections (b)(1)-(3) protect from ad valorem property tax discrimination "rail transportation property," elsewhere defined in 49 U.S.C. § 11503(a)(4) as "property . . . owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under [49 U.S.C. §§ 10501-10505]" (emphasis added). Thus, Congress expressed its plain intent that subsections (b)(1)-(3) would protect "rail transportation property" from discriminatory ad valorem property taxes regardless of whether a rail carrier owns the property or pays the tax. See, e.g., *General Am. Transp. Corp. v. Louisiana Tax Comm'n*, 680 F.2d 400 (5th Cir. 1982) (Section 11503(b)(1) protects specialty railroad cars owned by carlines and leased to shippers, who in turn pay railroads to carry these cars over railroad tracks in interstate commerce).



If subsection (b)(4) is incorrectly read to extend to taxes indirectly imposed on railroads, courts will be required to assess the degree to which various taxes imposed on a myriad of other potential non-railroad plaintiffs might "affect" railroads and to draw a line at some point beyond which the indirect effect is too tenuous to state a claim.<sup>21</sup> Congress could hardly have intended in subsection (b)(4) to extend protection from "discriminatory" taxation of any kind to every entity doing business with a railroad or, as illustrated by some of the carline plaintiffs in this case (which lease equipment to others than railroads), to every entity doing business with a person doing business with a railroad.<sup>22</sup>

#### **IV. None of the Arguments Historically Raised by Railroads and Carlines in 4R Act Actions Supports Rejection of the Plain Language of Section 11503(b)(4).**

Faced with the plain language of § 11503(b)(4), railroads and carlines in 4R Act actions have historically raised three arguments to push for a broad construction of the statute to vitiate the express wording of the subsection. First, the industry argues that the word "another" more logically refers to other forms of discrimination, not other taxes. However, the argument improperly requires rearrange-

<sup>21</sup>For example, Congress could not have intended subsection (b)(4) to allow a lumber company, a small portion of whose business consists of selling railroad ties to a rail carrier, to challenge in federal court a generally applicable gross receipts tax imposed on the lumber company on the theory that the tax exempts proceeds from the sale of real estate but not proceeds from the sale of railroad ties. See WASH. REV. CODE § 82.04.390.

<sup>22</sup>While the issue is not before the Court in this case, an assumption that respondents are proceeding as rail carriers challenging ad valorem property taxes imposed on their own rail cars should be regarded as just that and not as a binding *sub silentio* holding by this Court that persons other than rail carriers can bring suit under § 11503(b)(4). See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989).

ment of the words in subsection (b)(4). See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1990)("[B]asic principles of statutory construction [ ] require giving effect to the meaning and placement of the words chosen by Congress"). Congress has constructed subsection (b)(4) to apply to "another tax," not to any other kind of discrimination. As the Court recently explained:

Just as we are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and origins may require, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it.

*Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990)(citations and internal quotations omitted).

A second argument repeatedly asserted is that the 4R Act was intended to prevent tax discrimination against railroads in any form whatsoever and that the legislative history and broad language of the 4R Act demonstrate Congress' overriding concern with discrimination in all of its guises. The former of these propositions originated in *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.) *cert. denied*, 454 U.S. 1086 (1981) and the latter in *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Both propositions contradict the language of § 11503 and find no support in the legislative history.

In *Ogilvie*, the Eighth Circuit cited neither the language of § 11503 nor the legislative history it specifically relied upon for the proposition that the purpose of the 4R Act is "to prevent tax discrimination against the railroads in any form whatsoever." 657 F.2d, at 210. The Eighth Circuit's broad proposition is undermined, moreover, by the plain language of § 11503(b)(4) which applies to "another tax" and not "any tax." It also is contradicted by § 11503(a)(4) which expressly permits states to treat non-commercial and non-industrial, agricultural land, timber



land and property not subject to a property tax differently than property owned or used by rail carriers. Finally, it is shown to be patently wrong by the legislative history which is discussed in Section III of this argument.

The Eleventh Circuit, in contrast to the Eighth Circuit, at least cited the legislative history it relied upon. *Southern Ry.*, at 528. The cited legislative history, however, fails to support the broad proposition asserted. For example, S. Rep. No. 630, 91st Cong., 1st Sess. 15 (1969), provides:

The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal treatment with other taxpayers. *In the majority of States that now grant equal justice to all taxpayers, State property tax assessments, collections or rates would in no way be affected by passage of this bill.*

(emphasis added).<sup>23</sup> The quoted passages from S. Rep. No. 630, as well as the other legislative history discussed in this brief, show that Congress considered that the 4R Act's impact on states would be limited to certain abuses practiced by some, but not all, of the states. Certainly, nothing in the

<sup>23</sup>The same report at p. 6 provides:

The 1960 study report to this committee discussed two alternative recommendations to eliminate discriminatory tax practices. The first would be a Federal law to exempt the right-of-way of railroads and pipelines from ad valorem property taxation by the States. . . . The second alternative discussed was an antidiscriminatory tax bill such as S. 2289. The study report favorably commented on such a bill as follows (p. 466):

. . . The proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal treatment with other taxpayers.

Passage by the Congress of such a bill would not change the substantive effect of the tax laws of the several States because, without known exception, all States, either by constitutional safeguard or legislative provision declare it to be State law that taxpayers within its jurisdiction shall be taxed uniformly.

legislative history supports the notion that Congress intended § 11503 to be broad remedial legislation to be used by the courts—as the Ninth Circuit did in this case—to strike down all property taxation of carlines.

The legislative history does reflect Congress' concern that railroads were paying a disproportionate and unfair proportion of the cost of state government in certain states. See H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975). However, railroads actively participated in Congress' lengthy study of discriminatory taxation, submitting numerous reports to Congress on the subject during the fifteen years Congress considered the problem. Yet, nowhere in these reports or in other legislative history is the states' practice of exempting certain personal property mentioned as part of the problem § 11503(b)(4) was enacted to solve.

This omission is significant because, as the railroads and carlines themselves point out, since the early 1960's an increasing number of states have established exemptions for classes of business personalty—e.g., business inventories and agricultural personalty. Because of this, railroads and carlines argue that subsection (b)(4) must be read expansively to address what they now see as a problem. However, had the states' exemption of certain personal property been viewed as a problem, then Congress undoubtedly would have prohibited such exemptions specifically, rather than relying on general language to override what it expressly permitted in the three subsections addressing property taxes.

In *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978), this Court stated:

We may accept the proposition that agriculture has changed in the intervening 55 years, but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *United States v. Sisson*, 399 U.S. 267, 297 (1970). Considerations of this kind are for the Congress, not the courts.

If the exemption of certain personal property has become a problem since the enactment of the 4R Act, as the railroads and carlines claim, then they should seek relief in Congress, instead of asking this Court to rearrange or ignore the language of § 11503(b)(4) to better suit their "present-day tastes."<sup>24</sup>

The third argument of railroads and carlines contends that a refusal to include "exemption discrimination" within the purview of subsection (b)(4) would produce an absurd result that Congress could not have intended.<sup>25</sup> A review of the federal statutes protecting motor carriers and air carriers defeats this argument. Both the Motor Carrier Act of 1980 (codified at 49 U.S.C. § 11503a and prohibiting discriminatory property taxes on motor carriers) and the Airport and Airway Improvement Act of 1982 (codified at 49 U.S.C. § 1513(d) and prohibiting discriminatory property taxes on air carriers) contain provisions comparable to § 11503(b)(1)-(3) and both acts contain the same comparison class as provided in § 11503(a)(4). See 49 U.S.C. § 11503a(b)(1)-(3) and (a)(4);

<sup>24</sup>See *Union Bank v. Wolas*, 112 S. Ct. 527, 531 (1991) ("The fact the Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning").

<sup>25</sup>Even the United States argues that property tax exemptions must "be considered in determining whether the State has . . . effected discrimination against rail carriers" under subsection (b)(4). According to the United States, "[a]ny other interpretation of Subsection (b)(4) would require the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute." Brief for the United States as Amicus Curiae, on Pet. for Cert., at 10-11. The United States apparently agrees, however, that subsections (b)(1)-(3) plainly do not prohibit the complete exemption of nonrailroad property because exempt property is property not "subject to a property tax levy". See *id.*, at 5 n.10, 10.

49 U.S.C. § 1513(d)(1)(A)-(C) and (d)(2)(D).<sup>26</sup> Both acts, however, are limited to property taxes and neither act contains any provision comparable to § 11503(b)(4). Thus, Congress plainly intended in these acts to permit precisely the result that railroads, carlines and the United States characterize here as "absurd."

Only in the exceptional case will this Court depart from the literal or usual meaning of the words of a statute:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling. . . . This, however, is not the exceptional case.

*Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citations and internal quotations omitted). Nor is this the case for application of the exception as urged by the railroads and carlines. Construing the plain language of § 11503(b)(4) to only apply to non-property taxes is not demonstrably at odds with any intention of Congress to be found in the legislative history of the 4R Act. Congress chose to omit any provision comparable to subsection (b)(4) from both 49 U.S.C. § 11503a and 49 U.S.C. § 1513(d). Therefore, to construe § 11503(b)(4) to apply only to non-property taxes is merely to acquiesce in the Congressional policy choice evinced by its plain language. That result cannot be said to be absurd.

In the past, the Court has rejected invitations, such as the one offered by respondents here, to fill the interstices of existing law. *Andrus v. Sierra Club*, 442 U.S. 347, 356 (1979) (The Court will "decline to fracture" clear language of

<sup>26</sup>In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) this Court recognized that the antidiscrimination provisions of these two acts protecting motor carriers and airlines are "modeled on similar provisions in the 4-R Act[.]"

a statute to fashion from fragments a rule that accords with the "common sense and the public weal"); *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1943)(Judicial extension of statute beyond ordinary meaning not warranted simply because experience demonstrates need for a more comprehensive law); *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930)(Rejection of literal meaning of language in favor of one reflecting supposed spirit of the statute may transgress boundary between judicial and legislative power).

The Court should similarly decline the current overture. There is no warrant for finding that the matter of property taxes or exemptions is addressed in § 11503(b)(4). The application of a clear statement requirement in cases like this is further justified if Congress is to be discouraged from resorting to ambiguity (if, indeed, there is ambiguity in this case) "as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance."<sup>27</sup>

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<sup>27</sup>LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-8 (2d ed. 1988). Allowing parties to seek in the courts what was unobtainable legislatively is unsatisfactory in the Commerce Clause context where courts are provided with "no trenchant criteria for striking the balance that Congress managed to avoid." *Id.* The comment is particularly apt where discrimination for purposes of § 11503(b)(4) is left undefined.

## CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed for the reason that 49 U.S.C. § 11503(b)(4) does not apply to ad valorem property taxes.

DATED this 15th day of July, 1993.

Respectfully submitted,

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## APPENDIX

**49 U.S.C. § 11503****Tax discrimination against rail transportation property****(a) In this section—**

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

**(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:**

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

**(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—**

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

- (2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

## SECTION 306

### Prohibiting discriminatory tax treatment of transportation property

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention



of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.



NO. 92-74

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF  
OREGON, RICHARD A. MUNN, in his Capacity as  
Director of the Department of Revenue of the State of  
Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN  
TRANSPORTATION CORPORATION; GENERAL  
ELECTRIC RAILCAR SERVICES CORPORATION;  
PULLMAN LEASING COMPANY; RAILBOX  
COMPANY RAILGON COMPANY; TRAILER TRAIN  
COMPANY; UNION TANK CAR COMPANY,

Respondents.

On Petition for a Writ of Certiorari From The  
United States Court of Appeal  
For the Ninth Circuit

**AMICUS BRIEF OF THE STATE OF CALIFORNIA**

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NO. 92-74

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AMICUS BRIEF OF THE STATE OF CALIFORNIA

## I.

QUESTION PRESENTED

In other litigation currently pending in the Ninth Circuit, California has fully developed on the record a challenge to the standing of ACF Industries, Inc., General American Transportation Corporation, and Union Tank Car Company to raise claims under section 306 of the Railroad Revitalization and Regulatory Reform Act. Should this Court now avoid any determination of the standing issue regarding these three specific parties which would bar an independent standing determination below in California's case?

## II.

INTEREST OF AMICUS

The State of California files this brief for the limited purpose of calling this Court's attention to an appeal currently pending before the United States Court of Appeals for the Ninth Circuit (Court of Appeals Docket No. 93-15938, District Court Docket No. CV-92-02816-DLJ). A copy of the Notice of Appeal is included in the appendix as Exhibit A, a copy of the district court decision from which California's appeal is taken is included as Exhibit B.

California's concern is that this Court not assume that the standing issue has been resolved in relation to ACF Industries, Inc., General American Transportation Corporation and Union Tank Car Company, each of which is a respondent in these proceedings.

## ARGUMENT

### I.

#### THE STATUS OF THE STANDING ISSUE IN THE MATTER CURRENTLY PENDING BEFORE THIS COURT

##### A. The District Court Decision

In the District Court petitioner, Department of Revenue of the State of Oregon (DOR), raised the issue of respondents' standing to bring an action under the Railroad Revitalization and Regulatory Reform Act (the 4-R Act). But that challenge to respondents' standing, as construed by the District Court, treated all respondents (identified as "carlines") as being of the same nature. The challenge to the carlines as a group was based on DOR's statutory construction argument of the meaning of "any other tax" as that phrase is used in section 306(1)(d) of the 4-R Act.<sup>1/</sup> The District Court stated, "As the court discussed extensively in *Trailer Co. v. State Bd. of Equalization of North Dakota*, 710 F.2d 468, 471-73 (8th Cir. 1983), the close relationship between the railcar companies and the railroads results in discriminatory taxation against railroads when there is discriminatory taxation of railcar companies." The District Court Slip

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1. Section 306(1)(a) prohibits assessments of rail transportation property at a higher ratio to its true value than other commercial and industrial property is assessed in relation to its true value. Section 306(1)(d) prohibits "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . . ."

Opinion is appendix Exhibit C. Slip Opinion at p. 9. The DOR did not raise, and thus the District Court did not consider, the differences in the nature of Trailer Train Company and ACF Industries, Inc., General American Transportation Corporation, and Union Tank Car Company (hereinafter sometimes referred to as the "three respondents").<sup>2/</sup> Because the DOR's standing argument was not based on the distinction between the three respondents and Trailer Train no evidentiary record was developed to highlight that distinction and the standing motion brought by DOR did not rely upon that distinction.

##### B. The Ninth Circuit Decision

As the Ninth Circuit decision in *ACF Industries v. Dept. of Revenue of State of Or.*, 961 F.2d 813 (9th Cir. 1992) notes in footnote 2 at page 817, "The DOR argued below that the Carlines do not have standing to sue under sections 306(1)(d) because they are not common carriers by railroad. The DOR has apparently abandoned that argument on appeal, focusing instead on its argument that section 306(1)(d) does not apply to exemptions." While it is not entirely clear that the Ninth Circuit's characterization of the DOR's argument in the District Court is consistent with the District Court's interpretation of that argument, it is manifest that the Ninth Circuit decision treats the standing issue as having been

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2. Trailer Train Company has changed its name so that in the California litigation it is named TTX.



"abandoned".<sup>3/</sup>

While the Ninth Circuit decision goes on in footnote 2 at page 818 to state "In this case, we agree with the district court that the Carlines have standing." it does so without a factual record which establishes the distinctions between Trailer Train and the three respondents. Highlighting the failure to distinguish between the three respondents and Trailer Train is the court's statement in footnote 2 that "Reaching that very conclusion, the Eighth and Eleventh Circuits have emphasized 'the close relationship between [the Carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d).'" When that quote is compared with the original quote it can be seen that the bracketed phrase "[the Carlines]" in the original quote is actually "Trailer Train". *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987).

A reading of the district court opinion and the Ninth Circuit decision clearly illustrates that no attempt was made to distinguish between the characteristics of the three respondents and Trailer Train insofar as those characteristics relate to the standing of either Trailer Train or any of the three respondents to bring an action under § 306 of the 4-R Act.

The Ninth Circuit's footnoted discussion of standing fails to even mention, much less consider, the traditional tripartite test to be applied in evaluating standing. *Lujan v. Defenders of Wildlife*, \_\_ U.S. \_\_, 112 S.Ct. 2130 (1992).

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3. The District Court's description of DOR's standing argument appears at p. 6 of the Slip Opinion (Exhibit C).

## II.

### THE STANDING OF TRAILER TRAIN IS NOT CHALLENGED BY CALIFORNIA IN ITS NINTH CIRCUIT APPEAL

The issues raised by the DOR, in relation to which this Court has granted certiorari, are fully ripe for decision in spite of any standing defects which may exist in relation to the three respondents. While California has raised serious objections to the standing of the three respondents it has not done so in relation to Trailer Train. The standing of Trailer Train was the subject of a decision which established the special nature and relationship of Trailer Train to the various railroads which actually own that company. *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983). The nature of Trailer Train was also established in the District Court trial which led to the Ninth Circuit appeal cited in the Interest of Amicus section of this brief. California has accepted that decision and has not challenged the standing of Trailer Train in either the District Court or in the Ninth Circuit. Thus, whether or not the three respondents have standing, all of the legal issues presented by the DOR remain ripe for decision by this Court in relation to Trailer Train.

## III.

CALIFORNIA HAS RAISED SERIOUS  
ISSUES IN RELATION TO THE STANDING OF  
THE THREE RESPONDENTS

As the District Court decision in California's case (Appendix Exhibit B) shows, California's challenge to the standing of the three respondents was based on both a Motion to Dismiss and a Summary Judgment Motion. While the Motion to Dismiss necessarily was based on a lack of factual allegations to support the standing of the three respondents the Summary Judgment Motion was supported by evidentiary matter.

The District Court record contains not only evidentiary material regarding the nature of the three respondents but also declarations of expert witnesses regarding the effect of enjoining collection of property taxes from the three respondents; that is, would the economic benefit of such an injunction ultimately rest with the three respondents, the shippers whose materials are carried in the respondents' cars, or the railroads. A copy of the Points and Authorities in support of California's motion is included in the Appendix as Exhibit D.<sup>4/</sup>

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4. Briefly stated California has agreed that because Trailer Train is wholly owned by railroads it charges the railroads the minimum possible amount. If a profit is made it is distributed to the railroads which own Trailer Train. Any economic burden created by taxes thus, necessarily is passed on to railroads.

In contrast, the three respondents are privately (non-railroad) owned companies. The evidentiary record in the California case contains testimony of expert witnesses showing that because of the non-railroad ownership it is impossible to prove that all of the elements

In short, California has made a very serious, very well supported attack on the standing of the three respondents.

## IV.

WHILE THE STANDING ISSUE HAS BEEN  
IMPROPERLY ASSUMED IN SEVERAL LOWER  
COURT DECISIONS IT HAS NOT BEEN DECIDED  
ON A PROPER RECORD

As this Court held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1983):

"These cases thus did not directly confront the question before us. '[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5, 94 S. Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974). We therefore view the question as an open one."

In its Points and Authorities filed with the District Court in support of the Motions to Dismiss or for Summary Judgment (Appendix Exhibit D) California developed at length the manner in which some courts have concluded that all "Carlines" are protected by the 4-R Act and the faulty analysis which led to this conclusion based on the earlier holdings that Trailer Train was so protected. None

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of standing are present in relation to the three respondents.

of those holdings should be allowed to control when the Court is finally presented with a proper factual record in relation to the nature of the three respondents and the distinctions between them and Trailer Train.

### CONCLUSION

By filing this brief California attempts to fulfill the proper role of an amicus by bringing to this Court's attention a pertinent matter not raised by other briefs.<sup>5/</sup> California realizes that certiorari was not granted to consider the standing of the three respondents; nevertheless, because decisions refer to the standing of the parties to bring an action, California feels it appropriate to call the particular problems presented by the present case to the Court's attention. California respectfully requests that this Court make no standing determination regarding ACF Industries Inc, General American

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5. The Brief for the United States as Amicus Curiae states in footnote 11 at page 6:

"11Petitioner confirms that it no longer challenges respondents' standing under Subsection (b)(4). The petition states that the question of standing "may be considered settled for purposes of review at this level" (Pet. 5 n.5). By this, we take it that petitioner now concedes that, if the State's tax would violate Subsection (b)(4) with respect to rail cars owned by a rail carrier, the State's tax also could not be applied to the rail cars owned by the respondents in this case."

It is precisely this concession that California does not make in relation to the three respondents.

That brief and other briefs filed in this matter fail to distinguish between Trailer Train and the three respondents.

Transportation Corporation, or Union Tank Car Company which would bar an independent standing determination in California's case now pending in the Ninth Circuit.

DATED: July 15, 1993

Respectfully submitted,

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## **APPENDIX**

**EXHIBIT A**

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Attorneys for Defendant California  
State Board of Equalization

UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA

ACF INDUSTRIES INCORPORATED,	)	NO. C92 2816 DLJ
GENERAL AMERICAN	)	
TRANSPORTATION	)	
CORPORATION, RAILBOX	)	
COMPANY,	)	<u>NOTICE OF APPEAL</u>
RAILGON COMPANY, TTX	)	
COMPANY,	)	
AND UNION TANK CAR COMPANY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CALIFORNIA STATE BOARD OF	)	
EQUALIZATION,	)	
	)	
Defendant.	)	

Notice is hereby given that the California State Board of Equalization hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of this Court filed April 19, 1993, which denied defendant's motion: (1) to dismiss the complaint or in the alternative to dismiss each cause of action independently on the basis that this court was without jurisdiction to have issued its

NOTICE OF APPEAL



injunction enjoining collection of taxes from plaintiffs as prayed for in the complaint; (2) for summary judgment to the complaint or in the alternative as to each cause of action independently on the basis that this Court was without jurisdiction to have enjoined the collection of taxes from plaintiffs as prayed for in the complaint; and (3) to modify the preliminary injunction enjoining collection of taxes from these plaintiffs.

DATED: May 17, 1993

DANIEL E. LUNGREN, Attorney General  
of the State of California

/s/  
ROBERT E. MURPHY  
Deputy Attorney General

Attorneys for Defendant  
California State Board of Equalization

**EXHIBIT B**

ACF INDUSTRIES, et al.,	)	
	)	
Plaintiffs,	)	Case No.
	)	C-89-3449-DLJ
v.	)	
	)	
STATE BOARD OF EQUALIZATION,	)	
	)	ORDER
Defendant.	)	
	)	
_____	)	

On March 24, 1993, the Court heard defendant's motion to dismiss, defendant's motion for summary judgment, and defendant's motion to modify preliminary injunction. James McBride of Laughlin, Halle, McBride, Lunsford & Fletcher and Fielding Lane of Thelan, Marrin, Johnson & Bridges appeared on behalf of plaintiffs ACF Industries, General American Transportation Corp., and Union Tank Car Co. Robert Murphy of the State Attorney General's Office appeared on behalf of defendant State Board of Equalization. Having considered the papers submitted, the applicable law, the arguments of counsel, and the entire record herein, the Court hereby DENIES defendant's motion to dismiss, defendant's motion for summary judgment, and defendant's motion to modify preliminary injunction for the following reasons.

### BACKGROUND

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 54 (1976) (codified at 49 U.S.C. § 11503 et seq.), commonly known as the "4-R Act." Section 306 of the 4-R Act, 49 U.S.C. § 11503, prohibits discriminatory



state taxation of railroads. This provision states, in relevant part, that a state may not

assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

49 U.S.C.A. § 11503(b)(1) (West 1992).

This action involves a challenge to California's taxation scheme for rail transportation property. Plaintiffs ACF Industries, Inc., General American Transportation Corp., Railbox Co., Railgon Co., Trailer Train Co., and Union Tank Car Co. (collective referred to as "the Carlines"), are all private carline leasing companies in the business of leasing rail cars to non-railroad commercial companies. They allege that defendant State Board of Equalization ("the Board") has denied them tax exemptions given to other commercial and industrial property owners and has appraised their rail transportation property at a level which overstates the true market value of the property.

Specifically, Count I of the Complaint alleges that California's scheme of exempting various forms of commercial and industrial property while imposing an ad valorem property tax on plaintiffs was discriminatory under § 306(1)(d). Counts II and III of the Complaint seek relief under § 306(1)(a) for discrimination resulting from the assessment of their rail transportation property at a

ratio of true market value which exceeds the ratio of assessment of value for all other taxable commercial and industrial property in the state.

Defendant responds that even though plaintiffs' railroad cars fall within the literal definition of rail transportation property, such cars are not rail transportation property, and thus plaintiffs are not protected by § 306(1)(a).

Plaintiffs base jurisdiction on §306(2) of the 4-R Act, 28 U.S.C. § 1337, which confers original jurisdiction on the District Courts in relation to acts of Congress regulating commerce, and 28 U.S.C. § 1331, which confers original jurisdiction on District Courts for cases brought under the United States Constitution, laws or treaties. Defendant argues that the Court lacks 4-R jurisdiction because of the nature of plaintiffs and the manner in which their business is conducted. Defendant also contends that neither 28 U.S.C. § 1337 nor 28 U.S.C. § 1331 can confer jurisdiction in light of the Tax Anti-Injunction Act, 28 U.S.C. § 1341.

On February 24, 1993, defendant moved the Court to dismiss this action for want of subject matter jurisdiction as to the three plaintiffs. Alternatively, defendant moved for summary judgment as to the entire complaint. Finally, if the Court determines that it does have jurisdiction and denies the motion for summary judgment, defendant seeks modification of the stipulated preliminary injunction of November 23, 1992. Defendant's motions do not address plaintiffs Railbox Company, Railgon Company and TTX Company. Thus, the stipulated preliminary injunction which enjoined each of these plaintiffs' 1992 personal property ad valorem tax

payments remains in effect.

## ANALYSIS

### A. Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Defendant's motion to dismiss is based upon the argument that § 306 is inapplicable to carlines such as plaintiffs ACF Industries, GATC, and Union Tank because (1) they are not common carriers by rail, railroads or Trailer Trains and (2) they have little or no relationship with the railroad industry. Plaintiffs therefore have no standing under § 306.

Section 306(1)(d) prohibits the Board from imposing "any other tax which results in discriminatory treatment of a common carrier by railroad subject to [the Interstate Commerce Act]." Under § 306(1)(a), the subject of protection is "rail transportation property." "Rail transportation property" is defined as:

all property and other assets, irrespective of ownership, that comprises the entire operating unit devoted to rail transportation service.

49 CFR § 1201(ii)(30).

The Ninth Circuit's decision in ACF Industries, Inc. v. Department of Revenue of the State of Oregon, 961 F.2d 813 (9th Cir. 1992) ("ACF Oregon"), is relevant to this Court's determination of plaintiff's standing under § 306. In ACF Oregon, the Court considered the same

plaintiffs, ACF Industries, General American Transportation Corp., and Union Tank. The Carlines sought declaratory and injunctive relief against defendant's assessment and collection of the Carlines' personal property tax for 1988, alleging discriminatory taxation in violation of the 4-R Act. Specifically, the Carlines claimed that Oregon's taxation of railroad property was discriminatory because "a large majority of non-railroad business personal property is not taxed" while railroad property is taxed in full." ACF Oregon, 961 F.2d at 817. The Ninth Circuit reversed and remanded the district court's decision denying the Carlines' challenge.

On question of plaintiff's standing under § 306, the Ninth Circuit expressly stated "that, although the Carlines had standing to bring an action under section 306(1)(d), Oregon's exemption scheme constituted neither de jure nor de facto discrimination against the Carlines." ACF Oregon, 961 F.2d at 817 (emphasis added). The Court went on to explain:

The DOR argued below that the Carlines do not have standing to sue under section 306(1)(d) because they are not common carriers by railroad. The DOR has apparently abandoned that argument on appeal, focusing instead on its argument that section 306(1)(d) does not apply to exemptions. Although we have not specifically decided whether entities other than railroads have standing to challenge a state tax under section 306, we have considered such challenges without discussing the standing question. In this case, we agree with the district court that the Carlines have



standing.

Section 306(1)(d) prohibits any tax that results in discriminatory treatment of a common carrier by railroad, even if the effect is indirect. Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also "results" in discrimination against the railroads. Reaching that very conclusion, the Eighth and Eleventh Circuits have emphasized "the close relationship between [the carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d). In any event, the required analysis under 306(1)(d) could show an effect on private carlines which directly and integrally impacts on common carriers by railroad." . . . Trailer Train Co. v. State Bd. of Equalization, 710 F.2d 468, 471-73 (8th Cir. 1983) ("[B]ecause tax discrimination against the Carlines' railroad cars adversely affects common carriers by railroad directly and immediately as tax discrimination against the railroad cars of the carriers themselves, and because section 306(1)(d) prohibits any state tax which results in discriminatory treatment of a common carrier by railroad,' the plain language of the statute supports the district court's holding that [the Carlines have standing.]").

ACF Oregon, 961 F.2d at 817 n.2 (citations omitted). Although the Ninth Circuit did not hear argument on plaintiff's standing directly, because defendant had

abandoned their argument that plaintiffs were not common carriers by railroad on appeal, the Ninth Circuit did review the finding of the district court and expressly held that plaintiffs ACF, GATC and Union tank have standing under § 306. The circuit court remanded the case to the district court to enjoin defendant's collection of the ad valorem tax on the carlines' property.

The Court finds the Ninth Circuit's holding in ACF Oregon controlling in this case, and accordingly, DENIES defendant's motion to dismiss based on lack of standing.

B. Motion for Summary Judgment.

Defendant argues that § 306 was intended to cover "discriminatory treatment of a common carrier by railroad." "Discrimination" requires:

- (1) that the entity being discriminated against is a member of a class possessing a particular legal or legislatively defined characteristic ("the protected class");
- (2) that there is some law, act, or practice that causes disparate treatment of the protected class compared to others similarly situated with respect to the purpose of the law, act, or practice ("the classification"), and, most importantly;
- (3) that, as the result of the classification, he or she has suffered an unfair or unreasonable burden, impact, or deprivation of a right.



In this case, the protected class is "common carrier(s) by railroad subject to this part," according to § 306(1)(d).

In Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), the Supreme Court set forth the standards that must be met for a district court to have jurisdiction. the Supreme Court stated plaintiffs have the burden of proving (1) that they have suffered an injury in fact, the invasion of a legally protected interest which is concrete and particularized, (2) that there was a causal relationship between the injury and the conduct complained of, and (3) that it is likely that a favorable decision will redress the injury. Lujan 112 S. Ct. at 2136.

In particular, to satisfy the first factor, plaintiffs must show that they have suffered an injury created by § 306(1)(d), that is, that (1) they are common carriers by railroad or (2) they are sufficiently close to such a common carrier by railroad that any economic injury to them is also an injury to a railroad. This is similar to defendant's argument in favor of its motion to dismiss.

Plaintiffs have shown that there is a sufficiently close relationship between the Carlines and common carriers by railroad that any economic injury to the Carlines is also an injury to a railroad. While it is true that the Carlines and Trailer Train operate differently, the cars of each company are part of a national freight car pool which is used to transport goods and on which the railroads ultimately pay the cost of ownership, including any discriminatory taxes.

As a result of the Interstate Commerce Act of 1887 (the Act), railroads are required by law to maintain an adequate number of cars. Thus, private car companies such as the plaintiffs have developed. Private car

companies provide cars to shippers who in turn provide cars to the railroads. The development of private car companies, however, does not absolve the railroads of their obligation to provide shippers with cars. If the railroads were unable to fulfill their obligation, and as a result a shipper provided the necessary car to the railroad, the Act required the railroads to pay a fee to the shippers for the use of the car. The Interstate Commerce Commission (the ICC) has jurisdiction to regulate the railroads' use of the cars owned by private carlines, including prescribing the amounts that the railroads pay for the use of the cars. The requirement that railroads pay Carlines the cost of ownership of these cars insures that discriminatory taxes are passed through to the railroads.

Regarding the third factor, the redress of injury, defendant argues that enjoining the collection of any ad valorem taxes from plaintiffs will not redress any injury; instead, it will produce an unwarranted windfall for plaintiffs. Plaintiffs, in turn, submit that the injury in this case is "discriminatory and excessive ad valorem taxes which, absent a federal injunction, these Carlines will be compelled to pay." Plaintiffs' Opposition at 7. The Court agrees with plaintiffs that such "palpable economic injury" is unquestionably a sufficient basis for standing. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). The Court finds that at a minimum, there are no genuine issues of material fact in dispute on this issue of redress of the injury that warrant denying summary judgment at this stage.

Plaintiffs have also brought forth sufficient evidence of the second factor -- a causal relationship

between the injury and the conduct complained of -- to justify denying defendant's motion for summary judgment. The allegations of the Board's conduct, i.e., its overvaluation of the Carlines' property, its failure to equalize the assessments of the Carlines' property, and its imposition of a property tax on the Carlines where other commercial and industrial property is exempt, if true, all contributed to the economic injury suffered. Because defendant has failed to show that there are no genuine issues of material fact in dispute regarding plaintiffs' claims, the Court DENIES defendant's motion for summary judgment.

C. Motion to Modify Preliminary Injunction.

For the reason addressed above, the Court also DENIES defendant's motion to modify the preliminary injunction.

**CONCLUSIONS**

For the foregoing reasons, the Court ORDERS as follows:

1. Defendant's motion to dismiss is DENIED;
2. Defendant's motion for summary judgment is DENIED;

3. Defendant's motion to modify the preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated: April 19, 1993.

/s/  
D. Lowell Jensen  
United States District Judge

**EXHIBIT C**



IN THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF OREGON

ACF INDUSTRIES INCORPORATED,  
GENERAL AMERICAN  
TRANSPORTATION  
CORPORATION, GENERAL  
ELECTRIC RAILCAR SERVICES  
CORPORATION, PULLMAN LEASING  
COMPANY, RAILBOX COMPANY,  
RAILGON COMPANY, TRAILER  
TRAIN COMPANY,  
and UNION TANK CAR COMPANY,

Plaintiffs,

v.

DEPARTMENT OF REVENUE OF  
THE STATE OF OREGON, and  
RICHARD A. MUNN, in his capacity as  
Director of the Department of Revenue of  
the State of Oregon,

Defendants.

CV No. 88-1169-PA

OPINION

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PANNER, J.

Plaintiffs (Carlines)<sup>1/</sup> bring this action against defendants Oregon Department of Revenue and its Director, Richard Munn (collectively "Department"). They seek declaratory and injunctive relief against the Department's assessment and collection of Carlines' Oregon personal property taxes for the tax year 1988.

The parties agreed that there are no material facts at issue and this case would be tried to the court based on fact stipulations, briefing on the legal issues, and argument. After argument, Department moved to supplement the record. I grant Department's motion to supplement the record (#46).

I find for Department. Below are my findings of fact and conclusion of law as required by Fed. R. Civ. P. 52(a).

## BACKGROUND

### I. Carlines

Carlines are a group of eight railcar companies. They purchase or lease railcars and furnish them to common carrier railroads for transporting freight. Carlines

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1. The plaintiffs are: ACF Industries Inc., General America Transportation Corp., General electric Railcar Services Corp., Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company and Union Tank Car Company.

also furnish railcars directly to shippers. Carlines pay state taxes and pass the costs on the railroads through user charges.

Carlines have strong economic ties to railroad companies. For example, all the shareholders of plaintiff Trailer Train Inc. are railroads. Carlines have various mixes of customer types. For example, GATX Inc. leases 99% of its fleet to shippers and 1% to railroads. The percentages are the reverse for Union Tank Car Company Inc. Some plaintiffs are wholly-owned subsidiaries of others.

### II. The Oregon Property Taxation System

Under ORS 307.030, all tangible personal property in the state is subject to property tax unless it is expressly exempt. Taxes are assessed on 100% of true cash value. ORS 308.250. The average tax rate for 1988 is 2.489% of true cash value.

The following are examples of property expressly exempt from property taxation: agricultural machinery and equipment, business inventories, and agricultural products in the possession of farmers. ORS 307.0404 et seq. Motor vehicles are exempt from personal property taxation but are subject to fixed motor vehicle registration fees in lieu of property taxes. ORS 803.585. Standing timber is real property under Oregon law. ORS 307.010(1). It is taxed at harvest. ORS 321.005 et seq.

As of January 1, 1988, the market values of taxed and untaxed personal commercial and industrial property, motor vehicles, and standing timber in Oregon were as follows:

	Value \$ (billions)	% of Total
1. Taxed tangible personal commercial and industrial property, excluding motor vehicles and standing timber	4.8	18.4
2. Motor Vehicles	1.5	5.8
3. Standing Timber	11.6	44.0
4. Exempt	8.2	31.4
5. Total	26.1	100.0

### III. The Railroad Revitalization and Regulatory Reform Act

The parties stipulated that § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54, as codified, controls this action. Section 306 is codified at 49 U.S.C. § 11503.

Section 306(1) provides:

(1) Notwithstanding the provisions of 202(b), any action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial

property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(Emphasis supplied.) Under § 306(2), the district court has jurisdiction to enjoin substantive violations of § 306.

Paragraph (3)(c) of § 306 defines "commercial and industrial property" or "all other commercial and industrial property" as:

all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy . . . .

(Emphasis supplied). The parties agree that Carlines' property involved in this action is "transportation property" under § 306. The legislative history of the 4R Act, and its predecessors, spans about fifteen years. The goal of the 4R Act was to "eliminate the long-standing burden on interstate commerce resulting from discriminatory State



and local taxation of common and contract carrier transportation property." S. Rep. No. 1483, 9th Cong., 2d Sess. 1 (1968), accompanying S. 927 and S.Rep.No. 91-630, 91st Cong., 1st Sess. 1 (1969).

The parties dispute whether legislative history should be used to interpret § 306, and if so, what that history shows about legislative intent. As often is the case, the legislative history shows a long, bitter battle among various interested groups. The only thing it clearly shows is the intent to compromise.

## DISCUSSION

### I. Standing

Carlines assert standing under § 306(1)(d). They rely on the § (1)(d) language prohibiting any other tax which "results in discriminatory treatment of a common carrier by railroad." (emphasis supplied.) Carlines contend that this provision grants standing to parties challenging taxes that have a discriminatory effect on railroads, even if the effect is indirect.<sup>2/</sup> Department disputes Carlines' standing. It argues that this action concerns a challenge to property taxes, the subject of § 306(1)(c), not § 306(1)(d), which concerns any other tax. Therefore, Department reasons, the broad language of § (1)(d) does not apply in a challenge to property taxes.

The case law supports both positions. Although no case is binding or on all fours with this case, some of the reasoning is helpful.<sup>2/</sup> For example, in Trailer Train

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2. Naturally, such challenges must meet the traditional "case or controversy" requirements of Article III of the United States Constitution, and show injury and causation. Duke Power Co. v. Carlino Environmental Study Group, 438 U.S. 59, 72 (1978). However, there is no dispute about those requirements here.

3. I am persuaded by Department's eleven-line footnote with citations to authority, that "[o]ut-of-circuit holdings are not binding

Co. v. State Board of Equalization, 538 F. Supp. 509 (N.D. Cal. 1982) (Trailer Train California), the district court considered whether a business inventory property tax exemption that does not apply to railcar companies violates § 306(1)(a). That case presented the question whether § 306(1)(d) applies to railcar companies.

The Trailer Train California court held that railcar companies do not have standing under § (1)(d) because it read § (1)(d) as a prohibition against "discriminatory treatment" only of railroads. 538 F.Supp at 513. The court construed this as an "unequivocal limitation" of standing to common carriers by railroad. Id.

Other courts have held that § (1)(d) challenges are not limited to direct taxes on railroads. See, e.g., Department of Revenue v. Trailer Train Co., 830 F.2d 1567 (11th Cir. 1987); Trailer Train v. Bair, 765 F.2d 744 (8th Cir.), cert. denied, 474 U.S. 1021 (1985) (citing Trailer Train v. State Board of Equalization, 710 F.2d 468, 471-73 (8th Cir. 1983)); c.f. General American Transportation Corp. v. Louisiana Tax Commissioner, 680 F.2d 400 (5th Cir. 1982). These courts analyzed the question as one of legislative intent. They relied on the broad purpose of the 4R Act to eliminate the burden on interstate commerce resulting from discriminatory taxation of railroad transportation property.

The Ninth Circuit has not directly addressed standing under § (1)(d). However, in Trailer Train v. State Board of Equalization, 697 F.2d 860 (9th Cir.), cert. denied, 464 U.S. 846 (1983), the circuit took a broad, legislative intent-based approach to a discriminatory railroad taxation question under §§ (1)(a)-(c). There, the court said that a statute should not be interpreted so narrowly as to defeat its obvious intent. 697 F.2d at 865. I agree.

I find reasoning of the Fifth, Eighth and Eleventh

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upon courts within this circuit." Defendants' response Brief at 10 n.2.

Circuits more persuasive than Trailer Train California. The law in those circuits is analytically consistent with the Ninth Circuit. The 4R Act prohibits taxation that results in discriminatory treatment of railroads.

The Trailer Train California court notes that Congress could have removed the restrictive language "common carrier by railroad" if it intended to extend standing to railcar companies. 538 F.Supp at 513. Congress could just as easily have removed the words "results in" if it wanted to limit standing to railroads.

The obvious intent of § 306, taken as a whole, is to prohibit states and local governments from imposing discriminatory taxes on railroads. As the court discussed extensively in Trailer Train Company v. State Board of Equalization of North Dakota, 710 F.2d 468, 471-73 (8th Cir. 1983), the close relationship between the railcar companies and railroads results in discriminatory taxation against railroads when there is discriminatory taxation of railcar companies.

As Department argues, taking this approach to the extreme could produce absurd results. If any company that furnishes products to the railroad industry asserted standing under §(1)d), there would be almost no limit to standing. Congress certainly could not have intended that. However, given the undisputed close connections between Carlines and the railroad industry, I need not consider that problem. Carlines have standing.

## II. Challenge to the Oregon Property Tax System

The parties offer a vast array of options for deciding this case. They urge me to consider a variety of interpretations of § 306. This case appears to be one small part of a national litigation plan. I have no doubt that Congress or the Supreme Court will soon have a turn at grappling with § 306.

There are two possible types of discrimination under § 306, de jure and de facto, for lack of better

terms. I address each in turn.

### A. There is no de jure discrimination.

In examining whether there is de jure discrimination, I rely on two elements of § 306. First, § 306(1)(a) prohibits assessment of transportation property at a value which is higher in relation to its true market value, than that ratio for all other commercial and industrial property. That language means that a state cannot, for example, assess Carlines' property at 100% of its true market value, while assessing all other commercial and industrial property at less than 100% of its true market value.

Second, § 306(1)(c) prohibits taxing transportation property at a tax rate higher than the rate applied to all other commercial and industrial property. This means that a state cannot, for example, tax Carlines' property at 10% of its assessed value while taxing all other commercial and industrial property at less than 10% of its assessed value.

Oregon does not commit either of these discriminatory acts. All personal property is assessed at 100% of its true market value and is taxed at the same rate. There is no de jure discrimination.

### B. There is no de facto discrimination.

The question of de facto discrimination is more difficult. Courts have danced around the possibility of de facto discrimination under § 306. Presumably, they recognize how easily a state could evade the clear intent of § 306 by having a facially non-discriminatory tax, but exempting all taxpayers except railroads.

The court raised the specter of de facto discrimination in dicta in Clinchfield R. Co. v. Lynch, 784 F.2d 545, 552 (4th Cir. 1986). There, North Carolina taxed stored tobacco at 60% of its fair market value, lower than the rate for other property. The court held



that the trial court was correct in considering the differential tax rate as a factor in determining whether there was impermissible discrimination, saying:

Certainly, the 4R Act does not encroach upon the State's right to tax its citizens as it sees fit, as long as the tax does not discriminate against railroads. The problem . . . [with the North Carolina scheme] is not that it grants tax breaks for certain agricultural products. But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would be swallowed up in the exceptions.

784. F.2d at 552.

In ACF Industries Inc. v. State of Ariz., 714 F.2d 93, 94 (9th Cir. 1983), the Ninth Circuit considered the possibility of de facto discrimination even more obliquely. The court rejected the argument that under § 306, the State of Arizona ought to include business inventories as commercial property. Arizona categorically exempted business inventories from ad valorem taxes. The court's rejection of this argument was cryptic. It said only that it has "nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored." The court found no authority requiring untaxed property to be included in an average of assessed value for taxed property.

Trailer Train California is perhaps the most direct stab at the issue of de facto discrimination under § 306, but is still not especially helpful. There, the court rejected the argument that exempting business inventories from taxation discriminates against railroads, for two reasons. First, the court read § 306 to require that the comparison class of property be property that is subject to a property

tax levy, which by definition the exempt property is not. 538 F. Supp. at 512. This is tautological reasoning that could result in precisely the problem raised in Clinchfield.

More significantly, the court found no evidence that the business inventory exemptions were discriminatory against transportation property. The court found no evidence of differential treatment of taxpayers with respect to the assessment ratio or the tax rate. Rather, it was a case of an exemption for a class of property which the plaintiffs do not own. The court characterized the plaintiffs' argument as equivalent to a person with no taxable income arguing that deductions for charitable contributions favor the wealthy. 538 F. Supp. at 512. n.5.

In so holding, the court considered the policy reasons behind the business inventory exemption. The exemption was designed to eliminate the incentive for businesses to hold their inventories outside of the state. The court declined to find "backdoor" discrimination, noting that the exemption was neutral in application, and not directed against any particular class of taxpayer. Id. at 512. The court was careful to distinguish Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir. 1981), where personal property exemptions for certain types of property were available for particular types of taxpayers, but not railroads. Id. at 512 n.5.

This case amounts to a request that I examine the personal property tax exemptions in the Oregon tax system to determine whether the exemption scheme is discriminatory.

Carlines' claim rests in large part on the argument that Department violates § 306(d) by exempting standing timber from property taxes.<sup>4/</sup> This is conceptually the

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4. Carlines contend that some of the discriminatory effect of the property tax system comes through underreporting of taxable property. Department agrees that there is underreporting, but contends that the taxpayers are responsible for it and the State of Oregon does what it can to enforce reporting requirements. I agree that underreporting is not prohibited under § 306.



same type of argument that Clinchfield rejected, although in Clinchfield, the issue was tax rates, not exemptions. The value of standing timber demonstrates why it is so important to Carlines's argument to label standing timber "exempt".<sup>5/</sup> If standing timber and motor vehicles are "exempt", the percentage of exempt property would be 81.6%. Excluding motor vehicles reduces that to 75.8%.

If standing timber and motor vehicles are "subject to property tax", the percentage of exempt property is 31.4%. Excluding motor vehicles increases that to 38.2%. Neither party has provided, and I have found no bright line between a discriminatory and non-discriminatory percentage of exemption. Based on cases that have addressed the issue of what percentage exemption is discriminatory, I would have to conclude that the with- and without-standing timber figures straddle that line. For two reasons, I do not consider standing timber as exempt.

First, standing timber is taxed under an elaborate plan, which produces significant revenue for Oregon. Just because the tax is another way, does not mean that standing timber is not taxed. There is no evidence that Oregon timber owners benefit from the tax system at the expense of Carlines. Second, as in Trailer Train California, I find no reason to conclude there is "backdoor" discrimination in the exemption scheme. The scheme is neutral in application and there is no evidence that Oregon's tax system lacks an independently valid

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Carlines also contend that undervaluation of taxable property has a discriminatory effect. Undervaluation can be an element of underassessment under § (1)(a). Burlington No. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987). Department concedes undervaluation. However, Carlines have made no showing that undervaluation discriminates against them or that their property is not undervalued along with everyone else's.

5. To a lesser degree, Carlines rely on the motor vehicle exemption.

purpose.

If I assume that there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here, based on the above conclusions. In Burlington Northern v. Bair, 584 F.Supp 1229, 1237-38 (S.D. Iowa 1984), aff'd in relevant part, 766 F.2d 1222 (8th Cir. 1985) (other subsequent history omitted), the court found a 50% exemption impermissibly discriminatory. In Trailer Train v. Leuenberger, No. 87-L-29 (D.Neb. Filed Dec. 11, 1987), aff'd 885 F.2d 415 (8th Cir. 1988), the court found a 75% exemption impermissibly discriminatory.

I have found no cases, and Carlines have cited none, in which a court has found an exemption of approximately 30% impermissibly discriminatory. The burden is on Carlines to show impermissible discrimination. Carlines have not met that burden.

## CONCLUSION

I grant Department's motion to supplement the record (#46). Carlines have standing to bring this action. Carlines have not met the burden of showing that the Oregon property taxation system is impermissibly discriminatory under § 306 of the 4R Act. I grant judgment for Department.

DATED this 22 day of January, 1990.

/s/  
OWEN M. PANNER  
United States District Judge

**EXHIBIT D**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ACF INDUSTRIES INCORPORATED,	)	NO. C92 2816 DLJ
GENERAL AMERICAN	)	
TRANSPORTATION	)	
CORPORATION, RAILBOX	)	POINTS AND
COMPANY,	)	AUTHORITIES IN
RAILGON COMPANY, TTX	)	SUPPORT OF:
COMPANY,	)	(1) MOTION TO
AND UNION TANK CAR COMPANY,	)	DISMISS
	)	(2) MOTION FOR
Plaintiffs,	)	SUMMARY
	)	JUDGMENT
v.	)	(3) MOTION TO
	)	MODIFY
CALIFORNIA STATE BOARD OF	)	PRELIMINARY
EQUALIZATION,	)	<u>INJUNCTION</u>
	)	
Defendant.	)	
	)	
	)	
	)	



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UNITED STATES DISTRICT COURT FOR THE  
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ACF INDUSTRIES INCORPORATED,  
GENERAL AMERICAN  
TRANSPORTATION  
CORPORATION, RAILBOX  
COMPANY,  
RAILGON COMPANY, TTX  
COMPANY,  
AND UNION TANK CAR COMPANY.

**Plaintiffs,**

v.

CALIFORNIA STATE BOARD OF  
EQUALIZATION.

Defendant.

NO. C92 2816 DLJ

**POINTS AND  
AUTHORITIES IN  
SUPPORT OF:  
(1) MOTION TO  
DISMISS  
(2) MOTION FOR  
SUMMARY  
JUDGMENT  
(3) MOTION TO  
MODIFY  
PRELIMINARY  
INJUNCTION**

## INTRODUCTION

In their most recent action plaintiffs have sought alternative forms of relief asking either that defendant be enjoined from collecting any ad valorem taxes at all on plaintiffs' railroad cars or that, in the alternative, plaintiffs

be preliminarily enjoined from assessing cars at more than 59.6% of the values assigned to those cars by plaintiffs' expert.

Defendant first moves this court to dismiss this action for want of subject matter jurisdiction. By this motion defendant seeks to resolve an issue not yet decided in the Ninth Circuit, or indeed in any Circuit in this country. While jurisdiction has been assumed in the past the propriety of jurisdiction in relation to the three plaintiffs which are the subject of this motion is an open question.

In the event this court decides that it does have jurisdiction to hear this matter defendant moves for summary judgment as to the entire complaint based on the Points and Authorities and declarations submitted herewith. Finally, if the court determines that it does have jurisdiction and denies the motion for summary judgment defendant nevertheless seeks modification of the preliminary injunction issued in this matter.

Plaintiffs bring this action pursuant to § 306 of the Railroad Revitalization and Regulatory Reform Act (the 4-R Act). Complaint paras. 13-18, 26, 39.

Plaintiffs base jurisdiction on § 306(2) of the 4-R Act, 28 U.S.C. 1337 (which confers original jurisdiction on the District Courts in relation to acts of Congress regulating commerce); and 28 U.S.C. 1331 (which confers original jurisdiction on District Courts for cases brought under the United States Constitution, laws or treaties). Defendant contend that this court is without 4-R Act jurisdiction because of the nature of plaintiffs and the manner in which their business is conducted, and that neither 28 U.S.C. 1337 nor 28 U.S.C. 1331 can confer jurisdiction in light of the Tax Anti-Injunction Act, 28 U.S.C. 1341.

Defendant will show that plaintiffs are without standing to bring this action and thus this Court is without jurisdiction to hear any of plaintiffs' claims. But even if

it is determined that there is jurisdiction each of plaintiffs claims must fail.

Plaintiffs cause of action based on § 306(1)(a) is based on its allegation that defendant assesses its rail transportation property at a higher percentage of its true value than other commercial and industrial property in California is assessed in relation to its true market value. Defendant will show that even though plaintiffs' railroad cars fall within the literal definition of rail transportation property when § 306(1)(a) is properly construed in light of Congressional intent such cars are not rail transportation property and thus plaintiffs are not protected by § 306(1)(a).

Plaintiffs cause of action under 306(1)(d) is premised on the allegation that because California exempts various forms of commercial and industrial property from taxation the imposition of an ad valorem property tax on plaintiff constitutes discriminatory taxation and thus any taxation of plaintiffs must be enjoined. In response to this argument defendants will show either that the tax levied on plaintiffs' rail cars has no economic impact on any railroad or that any impact is *de minimus* and thus cannot constitute discriminatory taxation.

Further, in relation to both the § 306(1)(a) and § 306(1)(d) claims defendant will show that granting the relief sought by plaintiffs will not accomplish Congressional intent in that it will either have no impact at all on the financial resources of the railroad or only a *de minimus* impact.

## STATEMENT OF FACTS

Defendant has found no reported decision which considers in detail plaintiffs' business of leasing railroad cars. Understanding that business and the relationship of these plaintiffs to railroads is critical to understanding defendant's motions.



Plaintiffs are all in the business of acquiring and leasing rail cars. Evdo 8:12; Schaffer 7:9-16; Dinsmore 4:17, 5:2.<sup>1/</sup> They are not railroads. Keeney 1. Essentially all of the cars are then leased to non-railroad commercial companies. Dinsmore 4:23, 5:2; Schaffer 7:24, 8:6 (less than 5% leased to railroads); Evdo 8:2-12.

### New Car Leases

The leasing process starts with a contact between the plaintiff/lessor and a potential lessee; the contact may be initiated by either party. Evdo 11:8-19; Schaffer 8:13-17. The lessee will identify the type of car needed and plaintiff will then calculate the amount to be charged and make an offer based on such calculation. Schaffer 8:12; Evdo 12; Dinsmore 5:16, 6:7. While price (i.e. lease payments) plays an important part in establishing the terms of a transaction the lessee will not acquire a car unless there is an economic need for it. Dinsmore 35:19, 36:1; Evdo 11:20-23. The lease price is determined by attempting to calculate the cost of ownership of the car over its life, which is normally 28-30 years. Schaffer 15:4-8; Evdo 15:16-18; Dinsmore 31:19, 32:1. An amount is added for profit and that total is used as a base figure in establishing the lease price that the plaintiff hopes to get. But the price eventually agreed on is negotiated by the parties and may be different than the price generated by the above described process. Dinsmore 6:14-18; Schaffer

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1. References to depositions and declarations will be by the last name of the deponent or declarant as follows: Willard Keeney (Keeney); Thomas Gilligan (Gilligan); Brian R. Evdo (Evdo), ACF; Donald J. Schaffer (Schaffer), GATC; Stephen G. Dinsmore (Dinsmore), Union Tank. Copies of the depositions are filed herewith. The depositions taken were pursuant to a confidentiality agreement and will be filed directly with the court in sealed envelopes. Declarations of Willard Keeney (Keeney) and Michael Gilligan (Gilligan) are also filed.

13; Evdo 23:15-23.

Calculating the total cost of ownership requires adding three categories of value: (a) original cost, (b) general and administrative expenses (G&A), and (c) maintenance expenses. Categories (b) and (c) are estimated for the life of the car. Estimated G&A expenses include estimated ad valorem taxes for the life of the car Schaffer 10-16; Evdo 12-18; Dinsmore 5-11. The estimated ad valorem taxes are based on nationwide average. The Estimated taxes are a projected average based on a "standard ad valorem" determined by dividing past taxes by the total number of cars. Evdo 8:14-19; Schaffer 14:14-24, 20, 21:16, 22:3; Dinsmore 7-8, 9:3-5. Since rail cars move throughout the country it is impossible to know which state tax rates will be applied during different years. The projected tax rate thus may or may not equal California's tax rate in any year.

Taxes are estimated for a standard car as part of the G&A expenses in the same manner in which other G&A expensis are calculated. For example rent charges are equally apportioned among all the cars; taxes are similarly calculated by totaling all taxes paid on all cars, dividing by the number of cars and projecting that result over the anticipated life of the car. Dinsmore 13:19-21; Schaffer 21:16, 22:3. Projected taxes are thus not car specific.

The critical element in the process is not the amount of tax but where the economic burden eventually rests. In the short run the burden rests almost entirely on the lessor/shipper with only a very minimal impact on any railroad; in the long run it rests entirely on the lessor/shipper and not all on the railroad. Declaration of Thomas W. Gilligan, Declaration of Willard Keeney.

### Railroad Charges for Transporting Material

After leasing a car the lessee uses it to store or



transport materials. Keeney 2-3. When the lessee ships material (or even an empty car) it must pay a fee to the railroad. Keeney 2. That fee can either be a negotiated rate between the lessee (the shipper) and the railroad or a tariff approved by the Interstate Commerce Commission (I.C.C.). Keeney 3. The railroad and shipper negotiate a fee acceptable to both parties. Keeney 3. In recent years a negotiated fee has been used in virtually all shipments by lessees of these plaintiffs. Keeney 3.

The I.C.C. tariff is based on the assumption that the railroad is providing the rail car. When the shipper provides the rail car it is reimbursed by payment of a "mileage allowance" by the railroad. Actually the mileage allowance is first paid to the car owners (here, the plaintiffs) who then transfer it to the lessees/shippers pursuant to the lease agreement (normally as a set off against the lease payments due). Dinsmore 31:19, 32:1.

There is, in effect, a triangular trade. A car is leased to a commercial lessee which creates a payment obligation from the lessee to the lessor, the car is then used to transport material on the railroads which creates a payment obligation from the lessee to the railroad, but then, because the lessee's car is used a payment is made in the form of a mileage allowance, by the railroad to the lessor/owner of the car, and, finally, that mileage allowance is transferred to the lessee/shipper pursuant to provisions in the lease agreement.

Without consideration of the lease payment there is one circular payment of the freight charge from the shipper to the railroad followed by the mileage allowance from the railroad to the plaintiff/lessor which is then, in turn, paid to the shipper. None of these payments are a direct function of the payments due by the lessee to the lessor.

This process has been explained in detail at the inception of this argument so that the court will be able to have this in mind when considering the application of

the 4-R Act to defendant's arguments and the legislative history and purpose of the 4-R Act.

## ARGUMENT

### I.

#### THIS COURT IS NOT BOUND BY THE NINTH CIRCUIT ACF DECISION

In their Memorandum in support of their motion for preliminary injunction plaintiffs rely heavily on *ACF Industries v. Dept. of Revenue of State of Or.*, 961 F.2d 813 (9th Cir. 1992), (*ACF, Oregon*). At the inception of this argument it must be made absolutely clear that *ACF, Oregon* is not determinative of this motion. While normally a Ninth Circuit decision would be binding on this court that decision is not controlling as to defendants arguments because the Ninth Circuit: assumed one issue which was not raised on appeal (the critical standing issue); was not presented with an issued and thus didn't decide it (the distinction between these three plaintiffs and Trailer Train); and the parties stipulated to one issue to which this defendant does not stipulate (that plaintiffs' "property is 'transportation property'"). Each of these elements is absolutely essential to the Ninth Circuit decision and each is open to original decision by this Court.

These motions apply only to ACF Industries (ACF), General American Transportation Corporation (GATC) and Union Tank Company (Union Tank). While TTX Corporation (TTX, formerly Trailer Train) is also a party to this action this motion is not applicable to that

plaintiff.<sup>2/</sup>

Defendant's Motion Presents An Unresolved Question In the Ninth Circuit

The fact that this action is brought against ACF, GATC and Union Tank (hereinafter sometimes referred to as "the three plaintiffs", "the plaintiffs" or "these plaintiffs") rather than a railroad or Trailer Train presents a standing issue. In *ACF, Oregon*, the Ninth Circuit held that because Oregon exempted certain "tangible personal property" from taxation while taxing of all of plaintiffs' personal property constituted discriminatory taxation in violation of § 306(1)(d).<sup>3/</sup> But footnote two of that decision notes that while the standing issue had been raised at the trial court level the appellant had abandoned that argument on appeal. The footnote states, "Although we have not specifically decided whether entities other than railroads have standing to challenge a state tax under § 306, we have considered such challenges without discussing the standing question. [Citations] In this case, we agree with the District Court that the Carlines have standing." *Id.* at 817-818. Since the issue had been abandoned on appeal any ruling on that issue is not necessary to the decision and is, perforce, dictum.

To the extent *ACF, Oregon* refers to previous

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2. As defendant will illustrate the exclusion of Trailer Train renders inapplicable those decisions which have found Trailer Train (and its subsidiaries Railgon and Railbox) properly subject to section 306. While no railroads are parties to this action it is worthy of note that cases dealing with application of section 306 to railroads also are not necessarily applicable to these plaintiffs.

3. All of the three plaintiffs in this action were plaintiffs in the Oregon action in addition to General Electric Railcar Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company and Trailer Train Company.

decisions which have assumed the issue the pertinent law is set forth in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1983)

These cases thus did not directly confront the question before us. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974). We therefore view the question as an open one.

Footnote omitted.

It is indeed fortunate that this court is not bound by the dictum in that footnote as it then goes on to set forth a seriously flawed analysis of the impact of a tax on "Carlines" as it is eventually reflected in an impact on railroads. "Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also 'results' in discrimination against the railroads." The decision does not take into account in any fashion, at any point the striking differences between these three plaintiffs and Trailer Train.

Footnote two further states "Reaching that very conclusion the Eighth and Eleventh Circuits have emphasized 'the close relationship between [the Carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d). In any event, the required analysis under 306(1)(d) could show an effect on private carlines which directly and integrally impacts on common carriers by railroad." Emphases added. The interior quote is from the *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987). But, the actual quote is "the close relationship between Trailer Train and



common carriers . . ." 830 F.2d at 1573. Emphasis added. As defendant will show in detail, *infra*, there is a world of difference between the relationship of Trailer Train and railroads and the relationship of these three plaintiffs and railroads. There is no evidence in the *ACF, Oregon* that the court had before it any factual evidence regarding this striking difference. Defendant will show the court that this subtle segueing of "carlines" for Trailer Train, has, without supporting evidence, introduced a pernicious doctrine into the entire line of § 306 cases which has distorted application of that section so that it no longer reflects Congressional intent.<sup>4/</sup>

## II.

### THE STANDING ISSUE IS UNRESOLVED IN OTHER CIRCUITS

Not only is this an open question in the Ninth Circuit this standing question also has not been decided in any Circuit in relation to these plaintiffs.

Defendant recognizes that *General American Transp. v. Louisiana Tax Com'n*, 680 F.2d 400 (5th Cir. 1982), does find § 306(1)(a) applicable to GATC. But it is a very narrowly decided case. "The only issue before the Court is whether privately owned specialty cars are equipment 'owned or used' by rail carriers regulated by the ICC." *Id.* at 402. The decision holds that such cars are rail transportation property and simply concludes from that, "it makes little sense to deny private car companies

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4. It is noteworthy that all of the cases cited in footnote two in support of the argument that "Section 306(1)(d) prohibits any tax that results in discriminatory treatment of a common carrier by a railroad, even if the effect is indirect." are Trailer Train cases. Emphasis added. In each of these cases only Trailer Train, Railgon and Railbox were the plaintiffs.

the same protection against discriminatory taxation already provided to other railroad transportation property." *Id.* at 403.<sup>5/</sup>

This result was arrived at in a two page decision with no meaningful analysis of the facts of the car leasing business. This decision was not cited in *ACF, Oregon* and with the exception of three other citations it has sunk into its very well deserved obscurity. It was cited in *Fruit Growers Exp. Co. v. Norberg*, 471 A.2d 628 (1984), for the proposition that "Interstate rail carriers are obligated to provide facilities and equipment that are reasonably necessary to furnish safe and adequate service on American railroads." *Id.* at 631. The decision was further cited in *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987), where the court noted, "The case did not reach the issue of whether the taxation of such cars was to be considered in deciding whether there is discrimination under § 306(1)(d)." *Id.* at 1573 fn. 13. Finally, the decision was cited in yet another Trailer Train case, *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983), as a "see generally" citation. Both of these citations to Trailer Train cases and the decision itself fail to note the distinction between the three plaintiffs that are the subject of this motion and Trailer Train. That distinction will be developed in detail, *infra*.

As noted the only issue decided by *General American* was whether or not GATC's cars are owned or used by rail carriers; it did not consider GATC's standing to bring the action. Of equal importance, the decision recognizes that, "[t]he legislative purpose of the act is to prevent a state from unfairly burdening interstate carriers regulated by the ICC." *Id.* at 403. Footnote omitted. But the decision deals not at all with this critical question

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5. The decision fails to note the source of this "protection . . . already provided to other rail transportation property."



it presents: does a tax on any of these plaintiffs burden "interstate carriers regulated by the ICC". While the ICC definitions relied on may be helpful in placing plaintiffs' rail cars within the literal language of § 306(1)(a) they do nothing regarding § 306(1)(d) and nothing in relation to the basic issue the decision itself sets forth; does a tax on plaintiffs "burden" any entity protected by § 306.

*General American* does not consider the standing issue, has never been cited in a Ninth Circuit decision, did not consider the factual relationship between plaintiffs and railroads is limited to § 306(1)(a) and is not binding on this Court.

### III.

#### PLAINTIFFS STANDING MUST BE BASED ON ONLY THE 4-R ACT

An analysis of plaintiffs' claim must start with the Tax Anti-Injunction Act. That act (28 U.S.C. 1340) provides "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This is a jurisdictional section which limits other grants of jurisdiction *May v. Supreme Court of State of Colorado*, 508 F.2d 136, 137 (10 Cir. 1974). Plaintiff relies on 28 U.S.C. 1337 and 28 U.S.C. 1331 as bases for its alleged jurisdiction but because this action does seek "to enjoin, suspend and restrain" collection of California taxes the jurisdiction granted by those sections is eliminated by the Tax Anti-Injunction Act.

Plaintiffs must then rely on the 4-R Act as an exception to 28 U.S.C. 1341, if they are to establish this court's jurisdiction.

### IV.

#### § 306 IS TO BE CONSTRUED BY APPLICATIONS OF MAXIMS OF STATUTORY CONSTRUCTION, REFERENCE TO LEGISLATIVE HISTORY AND RELEVANT CASE LAW

Statutory construction is assisted by reference to three sources, maxims of statutory construction, legislative history, and case law. While various aspects of § 306 have been the subject of a great deal of each of these three factors its application to carlines such as these plaintiffs is scant at best.

#### Maxims of Statutory Construction

While maxims of statutory construction abound and seemingly contradictory maxims exist there is a general consensus that the most fundamental maxim is that a statute is to be construed in such a manner as to give effect to Congressional intent in adopting the statute. This maxim was applied in one of the § 306 consolidated cases before this court. In *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 (9th Cir. 1983), cert. denied 464 U.S. 846, where the court stated, "In interpreting a statute, the court's objective should be to ascertain congressional intent and give effect to legislative will. [citations]." In attempting to divine Congressional intent "A court may look beyond the express language of a statute where a literal interpretation thwarts the purpose of the overall statutory scheme or leads to an absurd result [citations]." *Id.* at 866. Both of these maxims are

pertinent to and supportive of defendants arguments.<sup>6/</sup>

Congressional intent can be garnered either from the words of the statute or from its legislative history. Both have been the subject of reported Congressional hearing and case law interpreting the language of the statute and will be considered infra.

### Legislative History

It is clear from the legislative history that not only was there a Congressional intent that any "discriminatory" taxation must impact on the railroads it is also clear that Congress was concerned with elimination of discriminatory treatment that had a financial impact on railroads. Even from the early stages of development of the 4-R Act this was apparent. From the beginning the intention was to provide protection to railroads "Procedurally it [§ 306] would provide a remedy in the Federal courts for common and contract carriers against the collection of the excessive portion of any tax based upon such unlawful assessment of rate." S. Rept. No. 91-630, 91st Cong. 1st Sess. (1969). Quoted in *Atchison, T. & S.F. Ry. Co. v. Lennen*, 640 F.2d 255, 299 (10 Cir. 1981). Emphasis added.

In the hearings before the Committee on Commerce United States Senate on July 16, 17 and 18 of 1975, William T. Coleman, Jr., Secretary of the Department of Transportation testified, "I want to stress that all the provisions of the bill, not just the loan guarantee section, will provide financial resources to the railroads. This is true of the pricing flexibility, section and other sections, such as the prohibition against discriminatory State taxation. The latter itself will save the railroads about 50 million dollars a year." *Id.* at 620.

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6. This court also has applied the congressional intent maxim to construction of § 306(1)(d). *Nat. R.R. Pass Corp. v. Cal. Bd. of Equalization* 652 F.Supp. 923, 926 (N.D. Cal. 1986).

"Congress identified inadequate financial resources available for the improvement and modernization of rail facilities as one of the major problems facing the railroads." S.Rept. No. 94-499, 94th Cong., 2d Sess. (1976), reprinted 1976 U.S. Code Cong. & Ad. News 1420.

### Case Law

In addition to the legislative history several courts have had reason to offer explanations which further clarify Congressional intent in enacting § 306. In *Nat. R.R. Pass Corp. v. Cal. Bd. of Equalization*, 652 F.Supp. 923, 927 (N.D. Cal. 1986) this court, per Judge Legge, stated, "As part of this revitalization, Congress included § 11503 [§ 306] specifically to remedy discriminatory taxation against railroads and to ease the tax burden on rail carriers." [Citation] Clearly this court thought was a tax burden on railroads was the object of Congressional action.<sup>7/</sup> In *Chesapeake and Ohio Ry. Co. v. Rose*, 651 F.Supp. 1463 at 1465 (1985 S.D.W.Va), the court stated, "A connection between inadequate financial resources and discriminatory taxation was discovered." One goal of the 4-R Act was to revitalize the railroad industry by assisting the industry to become competitive in the capital markets. *Id.* at 1465. In *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 207 (8th Cir. 1981) the court stated, "The purpose of the legislation was to remedy discriminatory taxation against railroads."

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7. This decision is an interesting example of the difficulty in relying on constructions of legislative intent. Following the above quote the court stated, "For these reasons, the court concludes that the prohibition of section 11503(b)(4) [section 306(1)(d)] does not require a showing of actual or quantifiable competition among the tax entities." *Id.* at 927. On the other hand in *Kansas City Southern Ry. Co. v. McNamara* 817 F.2d 368 at 374 (5th Cir. 1987), the court states "Rather the point was to put the railroads back on an even footing with other forms of transportation." Footnote omitted.



All the decisions construing § 306 make it clear in one way or another that the concern is with taxes imposed upon railroads and that the concern exists because draining money away from railroads by what the 4-Act deems to be improper forms of taxation creates a financial burden on the railroads lowering their income and making it more difficult for them to have access to capital markets for financing. The discrimination condemned by § 306 is not simply different treatment of railroads from other tax payers but a differing treatment that impacts the railroad in a financial manner.

V.

**BECAUSE THESE PLAINTIFF'S  
ARE CLEARLY DISTINGUISHABLE  
FROM TRAILER TRAIN THE  
CASES AND PRINCIPLES RELIED  
UPON IN DETERMINING THAT  
TRAILER TRAIN WAS  
PROTECTED BY § 306 ARE  
NOT APPLICABLE**

§ 306 Is Applicable to Trailer Train Only Because of  
Special Aspects Of That Company

The decision rejects this courts prior reliance on the fact that neither Trailer Train nor Railbox is a "common carrier by railroad" then goes on to hold, "Section 306(1)(d) provides that a state may not impose any [sic] tax which results in discriminatory treatment of a common carrier by railroad.' Emphasis added. The district court have properly recognized that because of the close relationship between the Carlines and common carriers by railroad, tax discrimination against Trailer Train and Railbox results in discriminatory treatment of common

carriers by railroad." Last emphasis in original. *Id.* at 471. Thus the Eighth Circuit decision recognizes that it is an ultimate financial impact on the railroads that is the *sine qua non* of a violation of

§ 306. The court determined that an improper tax on Trailer Train could constitute a violation of § 306 because, and only because of "the close relationship between the Carlines and common carriers by railroad . . ." Trailer Train was formed, owned and operated for the benefit of railroads. It was required to charge the lowest possible rate to the railroads using its cars.

Trailer Train (including Railbox and Railgon) is a unique company with special aspects which led the courts to determine that even though it was not a common carrier it was protected by § 306. Section 306(1)(d), on its face, applies only to common carriers and not Trailer Train.<sup>8/</sup> But for such a deviation from the literal language of 306(1)(d) Trailer Train would not have received the benefits of the protection of that section. The deviation from § 306(1)(d) was based on the "close relationship" between Trailer Train and railroads. *Trailer Train Co. v. State Bd. Of Equalization*, 710 F.2d 468, 471 (8th Cir. 1963). Accord: *Dept. of Revenue State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("We adopt the reasoning in the above mentioned Eighth Circuit case which referred to the close relationship between Trailer Train and common carriers and held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d)." Emphasis added.

*Trailer Train*, (710 F.2d 768) held that exempting personal property of other commercial industrial tax

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8. The courts chose not to follow the literal language of the statute. In another context the Ninth Circuit "rejected the literal reading of § 11503 [§ 306] as being inconsistent with congressional intent . . ." *Trailer Train* (697 F.2d at 866), *supra*.



payers from taxation while not doing so for Trailer Train violated 306(1)(d), but, it is critical to note, it did so only after holding that Trailer Train was subject to 306(1)(d) because of the "close relationship" between Trailer Train and the railroads. Without that close relationship 306(1)(d) would not have applied to Trailer Train and thus the exemption of personal property from taxation would have created no cause of action in Trailer Train.

These Plaintiffs Are Clearly Distinguishable From Trailer Train And Its "Close Relationship" To Common Carriers

As the Statement of Facts reveals these plaintiffs are dramatically different from Trailer Train in relation to two crucial aspects of the "close relationship" between Trailer Train and common carriers. Neither the first nor the third of the four factors listed in *Trailer Train*, (710 F.2d 468) exist in relation to these plaintiffs and those factors are absolutely essential in establishing standing.

These plaintiffs are not "owned by most of the major railroad systems in the United States" and they do not "furnish cars at the lowest possible rates."<sup>9/</sup> The combination of the first and third elements of the "close relationship" are of controlling legal significance. Trailer Train does not attempt to maximize its profits. These plaintiffs all attempt to maximize their profits.

Further, because Trailer Train was owned by the railroads if it did make a profit that profit was returned to

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9. As will become apparent in the discussion of the standing issue the first and third elements are critical while the second and fourth are of no particular significance. It is however noteworthy that these plaintiffs also differ from Trailer Train in Trailer Train's use of "the pooling arrangement". Plaintiffs' cars are not provided to railroads through a "pooling arrangement".

the railroads in the form of a dividend.<sup>10/</sup> In contrast, none of these plaintiffs are owned by railroads and thus any profits they earn are not distributed to railroads.

These two distinctions are critical to application of § 306(1)(d). If this court ultimately decides that Trailer Train is protected by 306(1)(d) and that the exemptions alleged by Trailer Train do constitute a violation of that section then it is reasonable to conclude that the financial benefits gained from such a ruling will be passed on to common carriers either in the form of lower rental rates or in the form of dividends from Trailer Train to its common carrier owners. But if this court should enjoin the collection of taxes on the property of these plaintiffs there is no reason to believe that the financial benefits gained will enure to the benefit of any railroads. If the tax exemption increases the income of these plaintiffs it will either be retained by the plaintiffs or passed on to their non common carrier owners. If, for whatever reason, the financial gain from the reduced taxes is passed on it will be to the lessees of these plaintiffs and not to common carriers. Thus, for example, if a plaintiff lowers its monthly rental to Dow Chemical because of the decreased taxes the benefit will accrue to Dow Chemical rather than to a railroad.

It is particularly important to note that in relation to cars already under lease at the time of any court injunction the benefits will accrue to a plaintiff. If a car has been leased for five years the terms of the lease are set and a change in taxes will not affect the amount of payments due from the lessee. Dinsmore 11:2-13; Schaffer 33. In relation to those cars under lease all of the benefits will constitute a windfall profit to a non common carrier plaintiff.

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10. As this court is aware from the prior trial in this matter on at least two occasions Trailer Train did pay a dividend to its owners.

## How The "Close Relationship" Test Was Improperly Expanded

Through a series of judicial decisions these plaintiffs acquired an apparent identity with Trailer Train at least in so far as application of 306(1)(a) was in issue.

Much of this process of equating these plaintiffs with Trailer Train, arose from the use of "carlines" to identify the parties in an action. Originally "carlines" was used to describe Trailer Train, Railgon and Railbox in *Trailer Train Co. v. State Bd. of Equalization*, *supra* 710 F.2d 468, 469 (8th Cir. 1983), the court stated, "Trailer Train and Railbox (hereafter collectively referred to as the 'Carlines') . . ." The use of Carlines to describe ACF and ten other companies appears shortly after in *ACF Industries, Inc. v. State of Ariz.* 714 F.2d 93, 94 (9th Cir. 1983) ("Eleven companies that own and lease railroad cars to operating carriers (the 'Carlines') . . .")<sup>11/</sup>

Use of "Carlines" to describe not only Trailer Train, Railgon and Railbox, but also to include these three plaintiffs appeared in this Court's decision in *ACF Industries v. Cal. State Bd. of Equalization*, 653 F.Supp. 390, 391 (N.D. Cal. 1986), "Plaintiffs are railroad car companies ('Carlines') . . ." and has consistently been used since that time to describe all the plaintiffs in this action as though they were fungible. This transmutation of "carlines" from Trailer Train to Trailer Train and ACF, GATC and Union Tank is carried over into the Ninth Circuit decision in *ACF, Oregon*. While ACF was the named appellant others included GATC, Trailer Train and Union Tank. The Ninth Circuit stated, "Appellants

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11. ACF does not "lease railroad cars to operating carriers" to any meaningful extent and nor do the other plaintiffs who are presumptively part of the eleven carriers. It is precisely this type of loose analysis which has led to the confusion regarding the identity of Trailer Train and these plaintiffs.

(collectively, the 'Carlines') . . ." *id.* at 815. Incorrect use of this title has been carried over by these plaintiffs into the Complaint (paragraph 17); the Preliminary Injunction pleadings "plaintiffs . . . (referred to collectively as the "carlines"). Plaintiffs' Memorandum In Support of Motion for Preliminary Injunction 2:2-5.

It may well be that a rose is a rose is a rose, but a Carline (Trailer Train) is not a Carline (ACF), a Carline (GATC), at Carline (Union Tank). A close reading of the *Trailer Train*, (710 F.2d 468) decision is crucial to an understanding of this problem. The state in that case had argued that because neither Trailer Train nor Railbox was a common carrier 306(1)(d) did not apply to them. In response the decision relied on the provision in 306(1)(d) that "any [sic] tax which 'results' in discriminatory treatment of a common carrier by railroad." Emphasis added." *Id.* at 471. Was prohibited by 306(1)(d). Thus, the limitation of 306(1)(d) to common carriers could be avoided if, but only if it could be proven that the tax "results" in discrimination against a common carrier.

The decisions explanation as to why that was true in relation to Trailer Train is the origin of the confusion between Trailer Train and these plaintiffs. The confusion is initiated at page 741 where the court, in one sentence, refers to both Carlines and Trailer Train, "The district court here properly recognizes that because of the close relationship between carlines and common carriers by railroad, tax discrimination against Trailer Train and Railbox results in discriminatory treatment of common carriers by railroad."

In short, those cases which have expanded on the concept that Trailer Train is protected by § 306 because of its "close relationship" to railroads are simply not applicable to these plaintiffs. These plaintiffs are not "carlines" in the sense of those cases, they have no close relationship to railroads, any tax injury done to them is not passed on to the railroad and any relief given under



the 4-R Act does not benefit railroads.

## VI.

### **PLAINTIFFS MUST, AND CANNOT, PROVE THE ELEMENTS NECESSARY TO ESTABLISH THEIR STANDING TO BRING THIS ACTION AND ACCORDINGLY THIS COURT IS WITHOUT JURISDICTION TO HEAR IT**

In *Lujan v. Defenders of Wildlife*, \_\_ U.S. \_\_, 112 S.Ct. 2130 (1992) (copy attached.) the Supreme Court set forth the standards to be satisfied before a District Court can have jurisdiction over a matter.

Starting with the Constitutional principal that federal courts have judicial power only in relation to cases and controversies the Supreme Court held that there can be no case or controversy unless the plaintiff has "standing" to bring the action. *Id.* at 2135 - 2136. The court set forth three elements of standing. Plaintiff has the burden of proving each and every element. *Id.* at 2136. Plaintiffs must prove (1) that they have suffered an injury in fact, the invasion of a legally protected interest which is concrete and particularized. (2) that there was a causal relationship between the injury and the conduct complained of and (3) that it is likely that a favorable decision will redress the injury. *Id.* at 2136.

#### Defendant's Summary Judgment Motion - Injury to a Legally Protected Interest

Defendant's Summary Judgment Motion puts in issue the facts necessary to establish the court's jurisdiction. Plaintiff's burden in response to the Summary Judgment Motion is set forth at *Lujan* page 2137

"In response to a summary judgment motion however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' F.R.C.P. 56(e), which for purpose of the summary judgment motion will be taken to be true."<sup>12/</sup>

Plaintiff's 306(1)(d) claim is based simply and solely upon an allegedly discriminatory tax created by the existence of specified exemptions from California's property tax laws. Complaint paragraphs 20-26. Plaintiffs do not allege that there is an economic or financial impact upon them caused by that exemption. That is, plaintiffs do not even allege that their property taxes are higher because of any exemptions created by California laws. To satisfy the first requirement of standing plaintiffs must prove an actual injury to a legally protected interest as a result of the exemptions.

At this point the Court's subject matter jurisdiction must be considered in tandem with plaintiff's standing. In relation to totally enjoining collection of state taxes this Court's jurisdiction extends only to those taxes violative of § 306(1)(d). That is the only "legally protected interest" at stake. Accordingly, plaintiffs must prove that they will suffer not just an injury but an injury--an invasion of a legally protected interest--where the interest is created by § 306(1)(d). That is, plaintiffs must prove "by affidavit or other evidence" (*Lujan* 112 S.Ct. at 2137) that (a) they are common carriers by railroad or (b) are sufficiently close to such a common carrier by railroad that any economic injury to them is also an injury to a railroad.

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12. If while plaintiff's evidence must be accepted as true insofar as it is adverse to defendant's summary judgment motion based on lack of standing/jurisdiction it need not be accepted as true to the extent it responds to defendants normal summary judgment motion.



### Causal Relationship

Plaintiffs will face an even more formidable obstacle in any attempt to prove the second element. First, because plaintiffs can not prove an injury they certainly cannot prove a causal relationship between a non-existent injury and the existence of the challenged exemptions. Further, if plaintiffs could prove that their taxes had increased at some point in time they would have to establish a causal relationship between such increase and the granting of tax exemptions to other property. It is particularly noteworthy that the Supreme Court has specifically held that plaintiffs have the burden of proving the causal relationship between the injury and the conduct of which they complain. *Lujan* 112 S.Ct. at 2136. Whether plaintiffs sue under § 306(1)(a) or 306(1)(d) they have the burden of proving the causal relationship between the existence of improper assessment exemptions and the alleged injury.

### Redress of Injury

The third requirement, that a favorable decision will redress the injury is not only an essential element of standing but it is also a perfect vehicle for considering a critical element of this case. If there is an injury to a railroad it will not be redressed by enjoining collection of taxes from these plaintiffs

Enjoining collection of any ad valorem taxes on plaintiffs' cars would produce an unwarranted windfall for plaintiffs without accomplishing congressional intent in adopting 306(1)(d).

In its most direct form this can be illustrated by consideration of the effect of such an injunction on cars under lease. When a plaintiff leases a new car it includes in the charges to the lessee an element intended to recover estimated ad valorem taxes. That charge remains

fixed for the life of the lease; any decrease in estimated costs (e.g. maintenance costs, ad valorem taxes) accrues to the benefit of the plaintiff/lessor. If this court enjoins collection ad valorem taxes on plaintiffs' cars plaintiffs will no longer have to pay them but will still collect the portion of the lease payments included to recoup tax payments. Where plaintiffs have been merely conduits to pass the taxes on to the lessee they now would become a repository for an unearned gain.

Was this the intent of Congress in passing the 4-R Act? Did Congress intend to deprive states of tax monies so that an unrelated non common carrier would gain an unearned profit?

Beyond the fact that plaintiffs should not so profit there is the additional factor that railroads, the intended 4-R beneficiaries, receive no benefit from the injunction. As defendant has illustrated neither the imposition nor the removal of an ad valorem tax on these plaintiffs affects railroads. Railroads do not benefit financially from an order enjoining collection of ad valorem taxes on these plaintiffs' cars. Since the purpose of § 306 was to aid the railroads financially the Congressional purpose cannot be achieved by enjoining collection of taxes on cars owned by these plaintiffs.

This same principle applies to plaintiffs attempt to rely on 306(1)(a). For the same reasons that enjoining collection of all ad valorem taxes would create an unjustified windfall for plaintiffs without accomplishing Congressional intent or financially benefiting railroads, enjoining collection of part of the taxes would benefit plaintiffs to the extent of the enjoined taxes without benefiting railroads to the same, or any, extent.

Plaintiffs thus do not satisfy the third *Lujan* standing requirement to bring an action under § 306(1)(d) or 306(1)(a). In fact, plaintiffs failed each and every *Lujan* test; there is no injury to a legally protected interest because plaintiffs are granted no such interest by § 306;

there is no causal relationship because there is no injury and to the extent there is a tax which appears to possibly create an injury there is no causal relationship between the tax and the alleged injury; finally granting plaintiffs the relief sought would not redress any injury to the railroads, the intended beneficiaries of § 306.

## VII.

### DISCRIMINATION HAS A WELL UNDERSTOOD MEANING AND IT MUST BE PRESUMED CONGRESS UNDERSTOOD AND USED THAT MEANING

The term "discrimination" and the phrase "discriminatory treatment of a common carrier by railroad subject to this part" in § 306(1)(d) are not defined anywhere in § 306. However, "discrimination" has an ordinary meaning which is well understood and followed within the practice of law, including in relation to the enactment of § 306(1)(d) and the 4-R Act in general. (*Richmond, Fredericksburg & Potomac Railroad Co. v. Dept. of Taxation, Commonwealth of Virginia* (4th Cir. 1985) 762 F.2d 375, 380-381 [the Virginia corporate net income tax has no undue financial impact on and therefore does not discriminate against railroads in violation of § 306(1)(d)], citing *Baker v. California Land Title Co.* (C.D.Cal. 1972) 349 F.Supp. 235, 238, *aff'd*, (9th Cir. 1974) 507 F.2d 895, *cert.den.*, (1975) 422 U.S. 1046; and see, *Chesapeake and Ohio Ry. Co. v. Rose* (S.D.W.Va. 1985.) 651 F.Supp. 1463, 1465 ["The 4-R Act was the congressional solution for state tax discrimination against railroads which had imposed financial burdens upon the railroad industry. Such taxation was determined to be an impermissible burden on interstate commerce"], *aff'd* 809

F.2d 785.)

Thus, in order to show discriminatory treatment under § 306(1)(d), there must some distinction or tax in favor of others and against a common carrier by railroad, which the courts have interpreted to mean that there must be an undue impact or burden on a railroad. (*Richmond, Fredericksburg & Potomac Railroad Co.*, *supra*, 762 F.2d at 380-381; *Department of Revenue, State of Florida v. Trailer Train* (11th Cir. 1987) 830 F.2d 1567, 1573, 1574 fn. 15 [disparate impact]; and *Kansas City So. Ry. Co. v. McNamara* (5th Cir. 1987) 817 F.2d 368, 374 [the effect of the action must be compared to the effect on others].)

Moreover, in all cases involving equal protection and Commerce Clause issues, "discrimination" means the same thing: unequal treatment that is legally prohibited because of an undue burden, impact, or deprivation of a right. The following cases are illustrative of the fact that in every context in which discrimination is found in the law, there is such an burden, impact, or deprivation upon the class or group at issue:

*Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 314-317 (Retirement statute does not impose a penalty upon a class defined as the aged and therefore does not constitute discrimination in violation of equal protection of the laws).

*Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 728-731 (A gender-based classification favoring one sex may be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. However, such an otherwise discriminatory classification is justified only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, and the policy of excluding males from the School of Nursing, rather than compensating for a discriminatory barrier faced by women, tends to



perpetuate the stereotyped view of nursing as exclusively a women's job).

*Kramer v. Union Free School District No. 15* (1969) 395 U.S. 621, 626, 632-633 (Any unjustified discrimination in determining who may vote or participate in political affairs undermines the legitimacy of representative government, and statute at issue is not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class)

*Trinova Corp. v. Michigan Dept. of Treasury* (1991) 499 U.S. \_\_\_, 111 S.Ct. 818, 835-836 (Under *Complete Auto* test regarding violations of the Commerce clause, Trinova could not point to any treatment on face of state value added tax statute that discriminates against out-of-state companies as opposed to those in-state, nor could Trinova point to any secondary sources that showed that tax statute was passed to "export tax burdens or import tax revenues".)

*Gomez v. Perez* (1973) 409 U.S. 535, 538 (There is no constitutionally sufficient justification for excluding illegitimate children from sharing equally with other children in a state's creation of a judicially enforceable right to obtain needed support from their natural fathers simply because the natural fathers are not married to their mothers and, for a state to do so, is an illogical, unjust, and invidious discrimination.)

*Schweiker v. Wilson* (1981) 450 U.S. 221, 230-234, 239 (In determining that statute excluding certain inmates of public institutions from receiving reduced amounts of SSI benefits was not discriminatory and thus did not violate said inmates rights to equal protection, the Court found 1) statute did not classify or make distinction between the mentally ill and a group

composed of nonmentally ill persons, but rather between residents in public institutions receiving Medicaid funds for their care and residents in such institutions not receiving said funds, and 2) to the extent that statute has indirect impact upon the mentally ill as a subset of publicly institutionalized persons, the record in this case did not support a contention that the mentally ill as a class are burdened disproportionately to any other class effected by the statutory classification.)

*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541-542 ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins*, *supra*; *Gaines v. Canada*, 305 U.S. 337. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. . . . The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.")

The above cases make clear that, at the minimum, in order to prove discrimination under § 306(1)(d), or otherwise, one must show all of the following:

- 1) that he or she is a member of the class of persons possessing a particular legally or legislatively defined characteristic ["the protected class"],
- 2) that there is some law, act, or practice that causes disparate treatment of the protected class compared to others similarly situated with respect to the purpose of the law, act, or practice ["the classification"], and, most



importantly,

3) that, as the result of the classification, he or she has suffered an unfair or unreasonable burden, impact, or deprivation of a right.

In short, one must prove membership in a protected class subject to a classification that is improper because it results in an undue burden, impact, or deprivation of a right. (See *e.g.*, *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 447-450.) The fact that a protected class is subject to a classification, by itself, does not suffice to prove illegal discrimination; rather, there must be an unequal and unreasonable burden, impact, or deprivation of a right of the protected class. (*Id.* at 446, and see *Mass. Bd. of Retirement v. Murgia, supra*, 427 U.S. at 314-317, and *Schweiker v. Wilson, supra*, 450 U.S. at 230-234, 239.)

In this case, it is clear that ACF, GATC, and Union Tank have not and cannot prove the first and third criteria necessary to establish discrimination under § 306(1)(d).<sup>13/</sup>

Section 306(1)(d) defines the protected class as "common carrier(s) by railroad subject to this part." There is no doubt that these plaintiffs are not common carriers by railroad. (*Trailer Train Co. v. State Board of Equalization* (N.D.Cal. 1982) 538 F.Supp. 509, 513.) Unlike the case of plaintiffs Trailer Train, Railbox and Railgon (discussed below), where one could argue otherwise, these carlines and the railroads do not have such a close relationship that the prohibition in § 306(1)(d) should apply to them.

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13. The Board also believes there is some question as to whether these plaintiffs can establish the second criterion, however the Board addresses only the first and third in this motion.

Once the Court finds that these carlines are not members of the protected class, it could stop its inquiry into whether there has been some discrimination in violation of § 306(1)(d). However, even if this Court were to find that these carlines are protected by the provisions of that section, the carlines must establish the third criteria necessary to prove discrimination. (See, *Chesapeake and Ohio Ry. Co. v. Rose, supra*, 651 F.Supp. at 1481 [Railroads have burden to prove the existence and extent of the alleged discrimination in violation of § 306(1)(d)].)

The question this Court must ask is: "What financial or other impact, burdens, and/or deprivations do these carline companies suffer from as the result of any allegedly excessive tax or tax exemption scheme in the State of California?" As discussed below, the Board submits that there are none.

#### VIII.

#### ALLEGED TAX DISCRIMINATION MUST BE MEASURED BY THE ULTIMATE ECONOMIC BURDEN OF THE TAX

If a state is charged with levying a discriminatory tax the legality of the tax is to be measured not against its legal incidence but by the ultimate resting place of the economic burden created by the tax. The Supreme Court has spoken many times on this subject in cases dealing with the federal government's immunity from State taxation. In *Washington v. United States*, 460 U.S. 536 (1982), the Court considered a sales tax on federal contractor and in doing so summarized its holdings from numerous cases. Several basic rules applicable to this case can be extracted from *Washington*, (1) "The important consideration, therefore, is not whether the state differentiates in determining what entity shall bear the

legal incidence of the tax, but whether the tax is discriminatory with regard to the economic burdens that result." *Id.* at 544. (2) It is not necessary to prove the transfer of the economic effect of the challenged tax, "The opportunity for the parties to allocate the economic burden of the tax among themselves was sufficient." *Id.* at 544. (Emphasis added.) (3) "[T]he economic burden of a tax imposed on the owner of non exempt property is ordinarily passed on to the lessee . . ." *Id.* at 543.

The Supreme Court reached the same result in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1982) in responding to an argument that a state tax discriminated against the United States. There the Court again looked for both the economic and the legal incidence of the tax in determining whether or not there had been discrimination. The decision looked to placement "of the burden" of the tax. *Id.* at 397.

As argued these plaintiffs are not entitled to the protection of § 306 because they are neither common carriers by railroad nor sufficiently related to such common carriers. But even if it is to be determined that they are entitled to § 306 protection there is no violation of that section unless the economic burden of the tax rests on the plaintiffs. Clearly in the present case, as in *Washington*, there is the opportunity for plaintiffs to pass the economic burden of the allegedly discriminatory tax on to the lessees.

Defendant has gone beyond this test and has offered economic proof that the challenged taxes would be passed on to the lessees/shippers. These plaintiffs have suffered no economic damage as a result of the tax exemptions; to the extent they may have created an economic impact on plaintiffs that impact was passed on

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14. Both of these decisions lend further support to defendant's argument that there can be no discriminatory tax without an impact or "burden" on the subject of the allegedly discriminatory tax.

to the shippers which are not protected by § 306. See generally the Gilligan declaration.

Since the ultimate resting place is, both by inference and economic testimony on an unprotected party there is no impact and thus no 306(1)(d) discrimination.

## CONCLUSION

Defendant asks this Court to decide a question of first impression: are these plaintiffs entitled to the protection of § 306(1)(d). There are two critical elements presented, (a) there must be discrimination and (b) it must be against a railroad.

"Discrimination" requires action against a specified protected class; here the class has been legislatively defined, it is "common carrier by railroad" (i.e. railroads). These plaintiffs are not railroads and thus are not entitled to § 306(1)(d) protection. Nor can these plaintiffs take advantage of the expansion of § 306 created by the *Trailer Train* cases because they lack the critical elements of *Trailer Train* which made the expansion possible.

The second element of discrimination, impact on the protected party is also lacking. Because the protected class is railroads plaintiffs must prove an impact on railroad. Defendant has affirmatively shown that there is no meaningful impact on railroads caused by any tax imposed on plaintiffs' railroad cars. It necessarily follows that there will be no impact on railroads caused by the exemptions of which plaintiffs complain.

Plaintiffs are not members of the protected class and any tax on plaintiffs' cars does not affect the protected class. The legal result of those facts can be phrased in a number of legal theories any of which is sufficient to cause dismissal of plaintiffs' actions: (a) the motion to dismiss on the merits can be granted for failure to state a cause of action (b) the summary judgment motion can be granted because plaintiffs lack standing under the *Lujan*

test (c) the motion for summary judgment can be granted on the merits of defendants arguments and supporting declarations (d) the preliminary injunction can be modified to strike the enjoining of the collection of all taxes because plaintiffs are not likely to prevail on the merits.

All of these same arguments and conclusions apply to plaintiffs' 306(1)(a) claim. An improper assessment and consequent higher taxes on these plaintiffs rail cars does not affect railroads and thus does not violate § 306(1)(a). Because any improper taxation of plaintiffs does not affect railroad defendant's motions must be granted as to both 306(1)(d) and 306(1)(a) which means, in effect, to § 306 in its entirety.

DATED: February 24, 1993

DANIEL E. LUNGREN, Attorney General  
of the State of California

/s/  
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Deputy Attorney General

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No. 92-74

In The  
**Supreme Court of the United States**  
October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE  
OF OREGON, RICHARD A. MUNN, in his  
Capacity as Director of the Department of  
Revenue of the State of Oregon,

*Petitioner,*

vs.

ACF INDUSTRIES, INC., ET AL.,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF STATE OF IOWA AS AMICUS  
CURIAE IN SUPPORT OF PETITIONER  
DEPARTMENT OF REVENUE

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## QUESTIONS PRESENTED FOR REVIEW

I. Is An Ad Valorem Tax "Any Other Tax" Subject To Section 306(1)(d) Of The Railroad Revitalization And Regulatory Reform ("4-R") Act Of 1976?

II. Do The Restrictions On Disparate Impact In Ad Valorem Taxes Found In 4-R Act Sections 306(1)(a) And 306(1)(c) Preempt Additional Disparate Impact Discrimination Analyses Of Ad Valorem Taxes Under Section 306(1)(d)?

III. Does Pervasive Disparate Impact Regulation Preempt All Other Discrimination Analyses Of Ad Valorem Taxes Under Section 306(1)(d) Of The 4-R Act?

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No. 92-74

In The

## Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE  
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Petitioner,

vs.

ACF INDUSTRIES, INC., ET AL.,

Respondents.

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF STATE OF IOWA AS AMICUS  
CURIAE IN SUPPORT OF PETITIONER  
DEPARTMENT OF REVENUE

## INTEREST OF THE AMICUS CURIAE

Amicus State of Iowa submits this brief in support of  
Petitioner,<sup>1</sup> Department of Revenue of the State of Oregon

<sup>1</sup> Iowa concurs in the briefs submitted by Petitioner and  
Amici State of Washington and National League of Cities, et al.

("Oregon").<sup>2</sup> Twenty-two railroads and more than 300 railroad car lines own extensive property and conduct transportation operations in Iowa. Iowa's continued ability to impose any ad valorem tax on railroad transportation property is brought into question by the Ninth Circuit's analysis of Section 306(1)(d). Iowa urges the Court to reverse the Ninth Circuit and hold that Section 306(1)(d) has no application to ad valorem taxes. If the Court finds it necessary to review ad valorem taxes for "discriminatory treatment" under Section 306(1)(d), Iowa requests the Court to adopt a test for discriminatory treatment that does not cast doubt on established principles of unit assessment.

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### STATEMENT OF THE CASE

Amicus Iowa adopts Petitioner Oregon's statement of the case.

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### SUMMARY OF ARGUMENT

Section 306(1)(d) of the 4-R Act does not apply to ad valorem taxes because it is limited, by its plain terms, to "other" taxes. Ad valorem taxes are regulated under Sections 306(1)(a) and (c) of the Act. The legislative history confirms that Section 306(1)(d) does not apply to ad valorem taxes.

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<sup>2</sup> This amicus brief is submitted on behalf of the State of Iowa by its attorney general. No consent to its filing is required.

The preemptive effects of the comprehensive regulation of ad valorem taxes under Sections 306(1)(a) and (1)(c) of the Act preclude other meaningful tests for "discriminatory treatment" under Section 306(1)(d), affirming that Congress intended Section 306(1)(d) to apply only to taxes other than ad valorem taxes.

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### ARGUMENT

#### I. The Plain Language Of Section 306(1)(d) Bars Application To Ad Valorem Taxes.

At issue in this case is the meaning of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976<sup>3</sup> ("4-R Act"), which prohibits: "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . . ." Under Sections 306(1)(a) and (1)(c) of the Act, ad valorem or property taxes are comprehensively and specifically regulated. Since Sections 306(1)(a) and (1)(c) apply to ad valorem taxes, it follows logically from the language of Section 306(1)(d) that "any other tax" refers to any tax *other* than ad valorem taxes. The reference to "other" taxes bars application of Section 306(1)(d) to ad valorem taxes.

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<sup>3</sup> Pub. L. No. 92-210, 90 Stat. 54 (Feb. 5, 1976), codified with some changes in language at 49 U.S.C. § 11503. "These changes 'may not be construed as making a substantive change in the laws replaced.' 92 Stat. 1466 § 3(a)." *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, n. 1 (1987). Further references to the 4-R Act are to Section 306. The text of Section 306 is provided in the Joint Appendix.



**A. Excluding Ad Valorem Taxes From The Meaning Of "Other" Taxes Is Warranted By Comprehensive Restrictions On Ad Valorem Taxes Imposed In Sections 306(1)(a) and (1)(c).**

Ad valorem taxes on rail transportation property are regulated under Sections 306(1)(a) and (1)(c) of the 4-R Act. Section 306(1)(a) (the "ratio" clause) prohibits ad valorem tax assessment ratio<sup>4</sup> differences between railroad transportation property and a defined comparison class of commercial and industrial property. Section 306(1)(c) (the "rate" clause) prohibits ad valorem tax rate or levy differences between railroad transportation property and a defined class of commercial and industrial property. Section 306(3)(c) defines the comparison class of property for both the ratio and the rate clauses as: "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and

<sup>4</sup> "Ratio" refers to a relationship of fractions defined by the Act. The first fraction is the assessed value of railroad property divided by the fair market value of railroad property. The second fraction is the assessed value of the Section 306(3)(c) comparison class of property divided by the fair market value of the comparison class. The Act specifies that this second fraction be determined through the "random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies)." Section 306(2)(e). The International Association of Assessing Officers has promulgated a standard with respect to such ratio studies. Gloudemans, et al., *Standard on Ratio Studies* (I.A.A.O., July, 1990).

which is subject to a property tax levy." Significant features of this comparison class are: (1) the combination of real and personal property, (2) the restriction to commercial and industrial property, (3) the excision of agricultural and timber property, and finally, (4) the exclusion of exempt property class by the requirement that the class be "subject to a property tax levy."

During the fifteen years the 4-R Act tax provisions were being considered by Congress, the comparison class used to determine if the states were differentially imposing ad valorem taxes on railroads evolved from a very broad class to a class with limitations crafted to accommodate state taxing interests.<sup>5</sup> In two instances,<sup>6</sup> the comparison class for the rate clause was "any other property" in the taxing district. Had Congress retained this broad comparison class, the effect would have been much the same as applying the general discrimination prohibition of Section 306(1)(d) to ad valorem taxes.<sup>7</sup> However, Congress later restricted the comparison class, demonstrating that the ad valorem tax regulation provisions of Sections 306(1)(a) and (1)(c) are independent of and should not be overridden by Section 306(1)(d). The rate and ratio

<sup>5</sup> See generally, Laronge, *Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 WILLAMETTE L. R. 635 (1990).

<sup>6</sup> S.B. 927 and S.B. 2289, discussed below.

<sup>7</sup> Compare the Ninth Circuit's holding that any significant exemption voids railroad taxation when Section 306(1)(d) is applied to ad valorem taxes with the testimony (discussed below) of the state witnesses on S.B. 927 and S.B. 2289 that the unlimited comparison class on the rate clause would lead to voiding railroad taxation whenever a state exempted property.

clauses are not, as suggested by the United States,<sup>8</sup> "per se" rules, which may be eclipsed by general discrimination analysis under Section 306(1)(d).

Congress set out a single comparison class in Section 306(3)(c), sanctioning continuation of many forms of traditional ad valorem tax classification which benefitted taxpayers other than railroads.<sup>9</sup> Congress amended the comparison class definition to allow states to favor residential, governmental, charitable, and church property by narrowing the comparison class to commercial and industrial property. Congress also allowed states to exempt agriculture and timber production from ad valorem taxation or apply special valuation rules to these properties by amending the comparison class to remove agricultural land and land used for growing timber. Finally, Congress permitted states to exempt other classes of property from taxation when Congress required that property in the comparison class be "subject to a property tax levy." If

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<sup>8</sup> Brief of the United States as Amicus Curiae, on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 92-74 (April 1993), p. 7, citing *Ogilvie v. State Board of Equalization*, 657 F.2d 204, at 210 (8th Cir. 1981), cert. den., 454 U.S. 1086 (1981).

<sup>9</sup> In addition, Congress added Section 306(2)(c) to allow the states some tolerance before assessment ratios and tax rates were found to be violative of the Act:

[N]o relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

the comparison class had not been thus restricted to create these safe harbors, favorable treatment or exemptions of any properties would have resulted in violations of the ratio or rate clauses.

When Congress limited the comparison class to commercial and industrial property other than timber and agricultural land, Congress removed much more property from the class than it left in the class.<sup>10</sup> In this context, unless there is a specific statement to the contrary, it is wrong to conclude that Congressional concerns about the scope of state exemptions under the "subject to a property tax levy" restriction were the driving force behind the addition of Section 306(1)(d).

Confirmation that Section 306(1)(d) is exclusive of ad valorem taxes lies in the complexity of defining "discriminatory treatment" for ad valorem taxes already restricted by the comprehensive ratio and rate regulations of the Act.

#### **B. The Plain Meaning Of The Restriction To "Other" Taxes In Section 306(1)(d) Was Intended By Its Sponsors And Understood By Congress.**

The references in the legislative history to the Section 306(1)(d) "any other tax" language support applying that

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<sup>10</sup> For example, 1992 Florida results show commercial and industrial real and personal property values aggregated less than \$280 billion of more than \$740 billion total real and personal property value. *Florida Ad Valorem Valuations & Tax Data December 1992* (Florida Department of Revenue, Division of Ad Valorem, 1992). (Relevant portions appended, together with supporting calculations and graphical summary.)

prohibition only to taxes other than ad valorem taxes. The provision was added as a result of concerns with discriminatory taxes imposed "in-lieu" of ad valorem taxes, such as gross receipts taxes.

The history of the "any other tax" clause starts with S.B. 927, in the 90th Congress. That bill contained analogues to Sections 306(1)(a) and (1)(c). However, the comparison class that S.B. 927 used to measure tax rate discrimination consisted of *any other* property in the taxing district. The implication of this broad comparison class was that railroads would not be taxed because there were significant amounts of exempt property in the comparison class. State tax administrators were very concerned about this potential effect of S.B. 927 and testified in favor of significantly restricting the comparison class to allow for several forms of state tax classification. In addition, some of the testimony and submissions noted that ad valorem taxes were not the only taxes which states imposed on common carriers. During 1969 Senate hearings, *State Tax Discrimination Against Interstate Carrier Property, 1969: Hearing Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on S.B. 2289, No. 91-28, (91st Cong., 1st Sess., July 30, 1969), ("Hearings on S.B. 2289")*, Charles Conlon, Executive Secretary of the National Association of Tax Administrators, submitted testimony and included a lengthy resolution against adoption of S.B. 927 (which was virtually identical to S.B. 2289) from the Western States Association of Tax Administrators Committee on Railroad and Utility Valuation. That resolution noted:

Still other deviations from pure property taxation are "in-lieu taxes" measured by a fixed

percent of gross earnings or gross rent earned in the state. Examples include private railroad cars, electric cooperatives, certain rural telephone properties, public utility districts and *even common carrier railroads*. Taxes "in lieu" of property taxes have frequently been enacted because equitable assessment within the confines of the property tax was deemed administratively impossible for special purpose, peculiarly situated properties.

*Hearings on S.B. 2289, at 86, 87.* Mr. Conlon's testimony also included a letter from D. M. Fisher, Assistant Director (U. & I.), Property Tax Division, Oregon State Tax Commission to Hon. Warren G. Magnuson, Committee Chairman. Mr. Fisher predicted that state legislatures would remove railroads from the ad valorem tax system and impose in-lieu taxes to avoid the onerous features of S.B. 927. Mr. Fisher's letter stated:

The thing that lurks in the background (and this has been discussed with several important railroad men) is that if S. 927 is enacted there is a genuine possibility that state legislatures will move railroads out of the property tax field and use alternative methods of taxation such as gross revenue tax. The end result then can very realistically be more burdensome on carriers than the present less than perfect property tax system.

*Hearings on S.B. 2289, at 76.*

Later drafts of Section 306 precursors in the House contained the Section 306(1)(d) "any other tax" clause. Steven Ailes, President of the Association of American Railroads testified at the 1975 hearings on H.R. 6351 and



H.R. 7681 and noted that those bills contained prohibitions against "any other tax which results in discriminatory treatment of a railroad." *Railroad Revitalization: Hearings Before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 6351 and H.R. 7681, No. 94-38 (94th Cong., 1st. Sess., July 15, 16, 17, 22, and 24, 1975), at p. 570.*

However, Senate drafts of similar legislation before the 94th Congress omitted the "any other tax" clause. After the House hearings, Mr. Ailes appeared at Senate hearings and suggested adding the "any other tax" language to Senate drafts. Mr. Ailes stated: "We suggest that the bill should be amended by adding a fourth prohibition, namely, *one against taxes that are in-lieu of discriminatory property taxes that are covered by the first three prohibitions listed above.*" (Emphasis added.) *Hearings Before the Subcommittee on Surface Transportation of the Senate Commerce Committee on Legislation Relating to Rail Passenger Service, No. 94-31, Part 5, at 1837. (94th Cong., 1st Sess., October 20, 21, & 30, 1975).*

Mr. Ailes' testimony before the Senate was supported by Stuart H. Johnson, Jr., counsel for the New York Dock Railway. Mr. Johnson suggested that the Senate insert the "any other tax" provision to relieve the New York Dock railroad from the burden of New York City's gross receipts tax – an in-lieu tax. *Hearings at 1885, 1886.* Subsequent Senate drafts of the 4-R Act tax provisions included the "any other tax" clause.

The only Congressional explanations of the "any other tax" provision refer to restrictions on "in-lieu tax."

See, e.g. the 1976 Conference Committee Report, *Railroad Revitalization and Regulatory Reform Act of 1976: Report of the Committee of Conference on S. 2718, Report No. 94-595 (94th Cong., 2d Sess., Jan. 27, 1976), p. 166, where the H.R. 10979 language is referred to as prohibiting "imposition of a discriminatory 'in-lieu tax.'"*<sup>11</sup>

## II. Sections 306(1)(a) and 306(1)(c) Preempt Section 306(1)(d) Analysis Of Ad Valorem Tax "Discriminatory Treatment" By Reference To Disparate Impact.

### A. The Ninth Circuit Decision Illustrates That Disparate Impact Cannot Be The Measure Of "Discriminatory Treatment".

Assuming, for the sake of argument, that ad valorem taxes may be reviewed under Section 306(1)(d), raises the question of what constitutes the prohibited "discriminatory treatment" in ad valorem taxes. If no satisfactory test for "discriminatory treatment" exists, then Section 306(1)(d) should not be applied to ad valorem taxes.

One possible test for discriminatory treatment would be to determine whether the subject tax system differentially affects railroads. The Ninth Circuit below applied this type of disparate impact analysis and voided Oregon's tax on car lines.<sup>12</sup> In contrast to the clear command

<sup>11</sup> The Seventh Circuit has held that the "any other tax" clause cannot be confined to "in-lieu" taxes, *Burlington N. R. Co. v. City of Superior, Wisconsin*, 932 F.2d 1185 (7th Cir. 1991). However, the result with respect to ad valorem taxes should be different because of the specific limitation to "other" taxes.

<sup>12</sup> Oregon's tax exemptions did not facially discriminate against railroads and the Ninth Circuit's *de minimis* analysis

of the Act to limit the comparison class to taxable property, the Ninth Circuit struck down Oregon's ad valorem tax on car lines because Oregon exempted, inter alia, merchants' inventories.<sup>13</sup> In doing so, the Ninth Circuit wrongly nullified an amendatory limitation on the Section 306(3)(c) comparison class worked out by Congress and reflected in the legislative history of the comparison class language provisions. The Ninth Circuit's decision is illustrative of the legal quagmire created by judicial attempts to fabricate a disparate impact test from the generic anti-discrimination provisions of Section 306(1)(d) when all meaningful disparate impact choices have been made by Congress under Sections 306(1)(a) and (1)(c). The next two sections explain the significance, history and timing of the Section 306(3)(c) limitation on the comparison class to property "subject to a property tax levy" that the Ninth Circuit voided and demonstrate why that limitation should be honored even if the Court applies Section 306(1)(d) to ad valorem taxes.

1. **The "subject to a property tax levy" limitation on the commercial and industrial comparison class was inserted to permit states to exempt any class and category of property from ad valorem taxes without 4-R Act consequences.**

Section 306(1)(a) prohibits:

The assessment (but only to the extent of any portion based on excessive values . . . ),

shows that the court was not dealing with an implied evasion problem.

<sup>13</sup> The Ninth Circuit's *de minimis* analysis indicates that the court would have stricken Oregon's tax on car lines for the merchants' inventory exemption alone.

. . . of a property tax . . . [on] transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property . . . bears to the true market value of all such other commercial and industrial property.

The comparison class of "commercial and industrial property" is defined in Section 306(3)(c) of the Act as: "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy."

The final phrase of the definition: "subject to a property tax levy," has a legislative history which refutes the Ninth Circuit's analysis of Section 306(1)(d). The history of the "subject to a property tax levy" clause covers the entire fifteen year span of consideration of the tax provisions of the 4-R Act, beginning with the *Doyle Report* in 1961, including extensive testimony and revisions to S.B. 2289 in 1969 and 1970, through final acceptance by Conference Committee in 1976 as an inclusion in Section 306(3)(c) of the Act.

**a. The Doyle Report.** The 4-R Act tax provisions had their genesis in the 1961 Report *National Transportation Policy, Report of the Committee on Commerce, United States Senate by its Special Study Group on Transportation Policies in the United States*, Report No. 87-445 (87th Cong., 1st Sess., June 26th, 1961), ("*Doyle Report*"). The *Doyle Report* suggested two alternative remedies to state tax discrimination against rail transportation property. The first was to exempt rail property from ad valorem

taxes. The second remedy was proposed by the Association of American Railroads ("AAR") and contained the first drafts of the ratio and collection restrictions which were later incorporated in Sections 306(1)(a) and 306(1)(b). The commentary in the report states that no substantive change of state tax laws was intended, but rather, federal enforcement and remedies were being added to existing state uniformity requirements:

This proposed anti-discrimination tax bill . . . has the obvious merit of insuring that such carriers would receive equal treatment with other taxpayers subject to the same tax rates in accordance with applicable State law. The proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers.

Passage by the Congress of such a bill would not change the substantive effect of the tax laws of the several States because, without exception, all States, either by constitutional safeguard or legislative provision declare it to be State law that taxpayers within its jurisdiction shall be taxed uniformly. The addition of a procedural remedy . . . is consistent with the obligation of Congress to regulate interstate commerce.

*Doyle Report*, at p. 466.

While discriminatory state tax practices were critiqued in the *Doyle Report*, state tax exemptions were not suggested to be a source of the discrimination. The committee reference to state uniformity clauses is telling, because only one state supreme court has gone so far as to hold ordinary exemptions to be violative of state uniformity requirements, and then only recently. *Northern*

*Nat'l Gas Co. v. State Bd. of Equalization & Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989), cert. den. sub nom., *State Bd. of Equalization & Assessment v. Northern Nat'l Gas Co.*, 493 U. S. 1078 (1990).

b. **S.B. 2289.** In 1969, S.B. 2289, another precursor to Section 306, was introduced in Congress. This bill also contained early versions of Sections 306(1)(a) and 306(1)(c) and, in addition, defined a comparison class of "any other property in the taxing district." However, the committee report contradicted the plain language of the bill, stating that wholly or partially exempt property was not intended to be part of the comparison class.

"[A]ny other property in the taxing district" is not intended to interfere or restrict state action in extending total or partial exemption to property of a class such as churches, charitable institutions, homesteads and the like. *In other words, property totally or partially exempted is not intended to be taken as a measure of "any other property" for tax rate purposes.* (Emphasis added.)

*Discriminatory State Taxation Of Interstate Carriers: Report of the Senate Committee on Commerce to Accompany S. 2289*, Report 91-630, p. 11 (91st Cong., 1st Sess., December 20, 1969). The conflict between the express provisions of S.B. 927 (virtually identical to S.B. 2289) and the similar Committee Report on that bill provoked pivotal testimony at the 1969 Senate Hearings on S.B. 2289.

Charles Conlon, Executive Secretary of the National Association of Tax Administrators, testified on behalf of 27 subscribing states and submitted a supplemental resolution on behalf of the Western States Association of Tax Administrators ("WSATA") Committee on Railroad and Utility Valuation.



One of Mr. Conlon's themes was that S.B. 2289 was an unjustified restriction on the states' ability to classify property for tax purposes. Mr. Conlon described state policy supporting "incentives for better land use, to encourage location of industry, for homestead tax relief and for old-age property tax relief" as having merit which should prevail over railroad tax concerns. *Hearings on S.B. 2289*, at p. 70.

The resolution from the WSATA Committee on Railroad and Utility Valuation criticized S.B. 927 (which was similar to S.B. 2289) for interfering with state prerogatives in classifying property for taxation, specifically including restrictions on exemptions. The resolution stated:

Basic to the whole problem, possibly is the question of whether the states have a right to classify property as to the different shares of the cost [of] government that different classes of property may legally be required to carry. Extreme examples are the exemption of certain properties from taxation. These exemptions may be for social, economic, or administrative reasons and include examples such as: . . . manufacturing plants under construction; industrial plants; personal property; . . . goods in process of manufacture . . .

*Hearings on S.B. 2289*, at p. 86.

Mr. Conlon's testimony was specifically subscribed by Washington State and amplified by a submission including proposed amendments from George Kinnear, Director of the Washington Department of Revenue. Mr. Kinnear stated:

Next let us consider the implications of using "all other property in the taxing district" as the basis for comparing carrier property assessments with other assessments.

The bill offers carriers a chance and opportunity to claim entitlement to lower tax assessment by reason of State or local policy decisions which are completely unrelated to any deliberate discrimination against common carriers.

I will give you some examples of sound policies which would create this unfair and improper result. First, a number of states have adopted so-called "Green-belt" legislation which provides for lower taxation for certain types of property. . . . For example some States have reduced the tax burden on inventories by various methods - for instance, by assessing them on 50% of full value instead of 100% - and this is done as a policy based on what are considered to be economic facts.

*Hearings on S.B. 2289*, at p. 101.

In 1970 House hearings on S.B. 2289 and H.R. 16245, Charles H. Otterman, Chief Counsel for the California Board of Equalization, submitted testimony on the issue of the conflict between the proposed statutory language of S.B. 2289 and the Committee Report conclusion that exempt property was not a part of the comparison class. Mr. Otterman cited as one particular concern that: "We have a 50-percent exemption for business inventories, and we have other things that I won't mention in detail, but all these things are done for policy reasons aside from discrimination against railroads." *Common and Contract Carrier State Property Tax Discrimination, 1970: Hearing Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce on H.R.*

16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639 and S.B. 2289, No. 91-61 (91st Cong., 2d Sess., June 9, 1970), p. 90 ("Hearings on H.R. 16245").

At the same hearings, the Advisory Committee on Intergovernmental Relations submitted a letter from its acting Executive Director, David Walker, in support of state authority to classify property for ad valorem tax purposes. Mr. Walker stated:

Certain types of personal property (e.g., merchant's inventories) may be assessed at a different percentage of value than other real and personal property, as in Florida. . . . As long as these differential tax burdens are hammered out in the open legislative arena - and not "negotiated" behind the closed door of the assessor's office - only the requirements of due process are needed as a safeguard against any arbitrary and unreasonable legislative classification.

*Hearings on H.R. 16245, at p. 2*

In order to cure the perceived problems with the overly broad comparison class, Mr. Conlon suggested comparison class language which would permit states to exempt property:

Explanatory comments in committee reports are extremely useful. However, they are in no sense a substitute for precise draft[s]manship in the first instance. If the bill means what appendix C says it means, why not say so in the bill?

For example, if the intended standard of comparison is the general average assessment ratio, the language of the bill might refer to:

. . . the assessment . . . of transportation property . . . on the basis of an assessment

ratio which is higher than the general average assessment ratio prevailing in the assessment district for property *subject to a property tax levy*. . . .

Or preferably:

. . . on the basis of an assessment ratio which is higher than the general average assessment ratio prevailing in the assessment district for comparable property *subject to a property tax levy*. . . .

The second alternative insures that where carrier property is included along with other types of business property in a separate classification for assessment purposes, the standard of comparison will be the assessment ratio prevailing in the assessment district for business property.

The references to tax rates may be similarly clarified by stating the standard as follows:

. . . at a tax rate higher than the tax rate generally applicable to *taxable property* in the taxing district. . . .

Or, again, preferably:

. . . at a tax rate higher than the generally applicable tax rate for comparable property in the taxing district. (Emphasis added.)

*Hearings on S.B. 2289, at pp. 80, 81.* Mr. Conlon's language appears, without change, in the comparison class definition of Section 306(3)(c).

Mr. Conlon was not alone. Mr. Kinnear also offered up his solution in almost identical language:

While I have been severely critical of S. 2289, as presently written, I feel a responsibility

to be constructive, rather than purely negative . . . I would not, as Director of the Department, oppose enactment of Federal legislation with the declared objective of S. 2289, if such legislation involved the following amendments: . . .

(a) the assessment . . . of transportation property . . . at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of non-transportation property in the assessment jurisdiction *subject to property tax levies* bears to the true market value of all such other property. (Emphasis added.)

*Hearings on S.B. 2289*, at p. 102. Mr. Kinnear also suggested limiting the tax rate comparison class to "taxable" property. *Hearings on S.B. 2289*, at p. 102.

Mr. Otterman suggested language restricting the comparison class to commercial "taxable property." *Hearings on H.R. 16245*, at p. 94. "Taxable property" is used at the end of Section 306(2)(e) synonymously with "subject to a property tax levy."

Messrs. Otterman, Kinnear, Conlon and Walker, along with numerous other witnesses, suggested that exemptions for merchants' inventories (and a wide variety of other properties typically or atypically exempted from tax) were state policy choices that ought to be protected from 4-R Act scrutiny. Mr. Conlon's language limiting the comparison class to property - "subject to a property tax levy" - appears without change in Section 306(3)(e). In adopting this language, Congress clearly permitted states to exempt any class and category of property without violating the 4-R Act.

The testimony from both Mr. Kinnear and Mr. Conlon goes even further. Their focus on taxable properties in the comparison class and the general or overall assessment of such properties shows that they intended every kind of exemption to be permissible. They were not concerned with what was removed from the tax base or how it was removed. The difficulties of determining assessment ratios for properties which were exempt, particularly for unreported items of personal property, would have been well known to Mr. Conlon and Mr. Kinnear. Mr. Conlon and Mr. Kinnear were also undoubtedly aware that no state had exempted (or is ever likely to exempt) a sufficient amount of all commercial and industrial real and personal property as to implicate the validity of the ratios on the remaining property.<sup>14</sup> Accordingly, the classification of exempt property and whether or not it could be characterized as discriminatory, did not confine Mr. Kinnear's and Mr. Conlon's intent in their submissions. All exempt property, particularly personal property, was intentionally removed from the comparison class.<sup>15</sup>

<sup>14</sup> Congress did provide for this unlikely event, however, when it set out an alternate comparison class of all taxable property in Section 306(2)(e).

<sup>15</sup> This review of the legislative history of the phrase "subject to a property tax levy" also refutes one of the principal arguments that the railroads and car lines have made to limit the scope of the "subject to a property tax levy" language. The railroads and car lines have argued that the limitation to taxable property was inserted solely to preserve the traditional state exemptions of governmental, charitable, and religious property. The language of the limitation on the comparison class does not support this interpretation and the Congressional history conclusively discredits any narrow interpretation of the limitation language.



Further support for the proposition that Congress adopted Messrs. Otterman's, Conlon's and Kinnear's intent in modifying the comparison class definition is provided by reviewing the other amendments to the Act which were suggested by these influential witnesses and accepted by Congress. Mr. Kinnear proposed that S.B. 2289 be amended to exclude agricultural land and timber land from the comparison class, to give the states a 5% threshold on ratio discrimination, and to refine the definitions of taxing districts and transportation property. Congress incorporated all these amendments in the 4-R Act. Mr. Kinnear's influence on the process of developing the 4-R Act was acknowledged by James A. Washington, Jr., General Counsel for the United States Department of Transportation. *Hearings on H.R. 16245*, at pp. 6, 7. Mr. Otterman testified in favor of restricting the comparison class to commercial property. Congress also adopted this limitation on the comparison class.<sup>16</sup>

In view of the language of the Act and the legislative history, it is clear that the dicta from *Ogilvie v. State Board of Equalization*, 657 F.2d 204, at 210 (8th Cir. 1981), cert. den., 454 U.S. 1086 (1981), that Section 306(1)(d) was inserted into the Act "to prevent tax discrimination . . . in any form whatsoever," is erroneous. No such statement about Section 306(1)(d) appears in the legislative history. The Eighth Circuit's statement is inconsistent with the actual language of the clause, which contains a limitation to "other" taxes. Review of the *Ogilvie* decision reveals

<sup>16</sup> For further exposition of these points, see Laronge, *Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 Willamette L. R. 635 (1990).

that the statement is based on the Eighth Circuit's incomplete assessment of the legislative history.<sup>17</sup> Examination of ad valorem taxes under Section 306(1)(d) would negate a host of carefully wrought compromises in the comparison class definition, such as the limitation to commercial and industrial property, the exclusion of agricultural and timber land, and most significantly, the limitation to taxable property, which was accepted by Congress after Section 306(1)(d).<sup>18</sup>

**2. The "subject to a property tax levy" limitation on the comparison class is not overridden by Section 306(1)(d).**

Another persistent argument made by the railroads and the car lines and accepted by the Ninth Circuit below is that Section 306(1)(d) is an overriding afterthought which should be read to negate the comparison class restrictions, particularly the "subject to a property tax" limitation, in Section 306(3)(c). However, the premise of this argument is not consistent with the actual history of the Act. Congress inserted the "subject to a property tax levy" language into the comparison class definition *after* Section 306(1)(d) was a settled part of the Act.

<sup>17</sup> See, Laronge, *Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 Willamette L. R. 635, nn. 69, 76 (1990).

<sup>18</sup> Section 306(1)(d) does not contain a reference to the Section 306(3)(c) comparison class of commercial and industrial property. The import of this omission is not that the courts are free to create another comparison class of property when considering 306(1)(d) claims against ad valorem taxes, but rather that Section 306(1)(d) does not apply to ad valorem taxes at all.

The 4-R Act resulted from Senate passage of S.B. 2718 and House passage of H.R. 10979, reconfigured as an amendment to S.B. 2718. The differences between H.R. 10979 and S.B. 2718 were resolved by Conference Committee. One significant difference between H.R. 10979 and S.B. 2718 was that the H.R. 10979 comparison class was not limited to property "subject to a property tax levy."<sup>19</sup> The Conference Committee accepted the Senate limitation of the Section 306(3)(c) comparison class of commercial and industrial property to taxable property.<sup>20</sup> This had the effect of ensuring that the comparison class limitation to taxable property applied to both Sections 306(1)(a) and (1)(c). Section 306(1)(d) was already a feature of both H.R.

<sup>19</sup> Compare § 207(c)(3) of S.B. 2718 (text appended) with § 601(2)(c) of H.R. 10979 (text appended). H.R. 10979, § 601(1)(a) (analogous to the § 306(1)(a) rate clause) contained a separate limitation on the comparison class which excluded exempt property. This limitation was not included in the definition of the comparison class and did not apply to § 601(1)(c) (analogous to the § 306(1)(c) rate clause). This same pattern appeared in S.B. 927 and S.B. 2289. The discrepancy in the comparison class definitions created the doubts about the scope of relief being afforded to railroads reflected in the testimony of Messrs. Kinnear, Conlon, Walker, Otterman, et al., cited above.

<sup>20</sup> See *Railroad Revitalization and Regulatory Reform Act of 1976: Report of the Committee of Conference on S. 2718*, Report No. 94-595 (94th Cong., 2d Sess., Jan. 27, 1976), at 166. ("The conference substitute follows the Senate bill" except for the so-called "Tennessee Amendment").

10979 and S.B. 2718<sup>21</sup> and thus did not require a choice by the conference committee.<sup>22</sup>

With all the choices that Congress made on the operation of Sections 306(1)(a) and (1)(c), including the significant restrictions on the comparison class, the use of ratio studies to test for differential tax assessment ratios, and the 5% threshold, it makes no sense to apply any separate differential or disparate impact analysis under Section 306(1)(d).

### III. Facial Discrimination Tests Cannot Be Satisfactorily Applied To Ad Valorem Taxes.

Rejecting disparate impact as a test for discrimination under Section 306(1)(d) is called for because of preemption reflected in the plain language of the Act. Other widely accepted tests for discrimination present problems of similar difficulty.

Facial discrimination is another potential test which may be evaluated. However, facial discrimination tests

<sup>21</sup> Compare § 207(a)(4) of S.B. 2718 with § 601(1)(d) of H.R. 10979.

<sup>22</sup> S.B. 2718 also contained a provision which would have allowed states to continue discriminatory practices if incorporated in state constitutions. This provision was known as the "Tennessee Amendment." House objections to this provision prevailed in Conference Committee. In the retention of the Senate's limitation of the comparison class to property subject to a property tax levy and the rejection of the Senate's "Tennessee Amendment," the House and the Senate appear to have swapped horses.

are susceptible to misuse, may void existing and established taxing methodologies and add no meaningful protections to those already provided to railroads under Sections 306(1)(a) and (1)(c).

**A. Facial Discrimination Tests Have Been Rejected By The Seventh And Eleventh Circuits.**

Two Circuits have rejected facial discrimination analysis under Section 306(1)(d). See, *Dep't of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987), (rejecting constitutional discrimination analysis) and *Burlington N. R. Co. v. City of Superior, Wisconsin*, 932 F.2d 1185 (7th Cir., 1991) (reversing trial court application of a facial discrimination test.)

**B. Facial Discrimination Analysis Will Invalidate Taxes Where There Is No Disparate Impact.**

Since railroads are already protected by a comprehensive scheme of ad valorem tax disparate impact restrictions, applying an additional facial discrimination analysis to ad valorem taxes would create a host of problems. The railroads may use a facial discrimination analysis to attack allowable state tax policy choices embedded in the comparison class definition. For example, railroad car lines might argue that inventory exemptions or industry location exemptions should void railroad car line taxation because such exemptions are merely disguised facial discrimination, since it is well known that car lines have no inventory and are already located in every taxing state. These arguments would bring into question state

exemptions expressly permissible under the limitation of the comparison class to taxable property.

Even if the Court enunciates a facial discrimination test that protects allowable disparate impacts on railroads, this still leaves the possibility that railroads will attack state tax classification schemes that cause no differential impact. However, there is no indication in the language of the Act or the Congressional history that separate classification not leading directly or indirectly to disparate tax impact was of any concern to the railroads or Congress. In addition, facial discrimination tests, which do not measure the impact of the discrimination, lead to an all or nothing remedy. Any separate classification of railroads for taxation, such as is common in apportionment formulae or unit-rule assessment statutes, could lead to wholesale voiding of state railroad taxation. There would be no rational way to excise only the discriminatory portion of such classifications without engaging in preempted disparate impact analysis.

**C. Facial Discrimination Tests Implicate Unit Rule Assessment.**

Discrimination tests which invalidate tax systems for different facial classifications of railroads bring into question the validity of unit assessment of railroads. A majority of states classify railroad and public utility property for unit-rule assessment, relying on *State Railroad Tax Cases*, 92 U.S. 575 (1875) and *Adams Express v. Ohio State Auditor*, 165 U.S. 194 (1897), reh. den., 166 U.S. 185 (1897). Unit-rule assessment is an ad valorem tax determination which focuses on the valuation of the entire operating



unit of a subject company. The unit valuation is then fairly apportioned to the taxing state and the taxing state's apportioned value further allocated among the taxing districts within the state. Unit-rule assessment contrasts with typical assessment procedures that focus on valuation of individual parcels of real and personal property.

The Eighth Circuit's analysis in *Burlington N. R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), indicates that classification of railroads with other utility property is an insufficiently broad group to sustain the classification against a charge of facial discrimination. If this precedent is not disapproved, facial discrimination analysis may void unit-rule assessment, since classification of railroads and utilities is a feature of all unit-rule assessment statutes. A trial court in Iowa has already found inherent discrimination between unit-rule assessment of railroad property and local assessment of commercial and industrial property, which resulted from unit-rule assessment's intrinsic capture of "intangible" values.<sup>23</sup> While Congress may have the legislative authority to preempt unit-rule assessment, more than a misinterpretation of the thin history of Section 306(1)(d) should be required before the Court upsets such an accepted, universal system of taxation.

<sup>23</sup> See *Burlington N. R. Co. v. Bair*, 4:90-CV 60406, U.S. Dist. Ct., S. Dist. of Iowa, Central Division, Ruling & Order (March, 1993), relevant portion appended (calculation of relief modified on motion for clarification).

#### IV. Case By Case Analysis Of Discrimination Should Not Be Applied To Ad Valorem Taxes.

Another possible approach to applying Section 306(1)(d) to ad valorem taxes would be to leave to the lower courts discretion to decide case by case whether each state tax system discriminated. However, if the Court does not tie the determination of discrimination to a fixed comparison class or limit the finding of discrimination by requiring some other threshold, such as facial discrimination or intent, Section 306(1)(d) becomes unenforceably vague and subject to constitutional attack. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (striking statute which prohibited "unreasonable" rate or charge for necessities); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969) (striking University of Wisconsin suspension of students for "misconduct."). Case by case analysis means that different conclusions will be drawn in different courts and there will be no predictability about what tax systems will be invalidated.

The Ninth Circuit's decision below illustrates the mischief that can result from handcrafted comparison classes. The Ninth Circuit rejected the Section 306(3)(c) comparison class as a reference point for its discrimination analysis because Section 306(1)(d) does not refer directly to the comparison class. The Ninth Circuit then constructed another comparison class which included exempt property but honored the other exclusions from the comparison class such as agricultural land, governmental property, etc. With no statutory basis for choosing which comparison class limitations to honor, the Ninth Circuit's selective inclusion of exempt property cannot be justified. Standardless selection of the comparison class

elements used as a reference point for discrimination analysis of ad valorem taxes will lead to arbitrary choices of which tax systems to void. The Court should not leave the lower courts to unrestricted case by case determinations of discrimination.

Since there is no satisfactory way to apply the Section 306(1)(d) discrimination prohibition to ad valorem taxes, the Court should follow the plain language of the Act and restrict Section 306(1)(d) to taxes other than ad valorem taxes.

### CONCLUSION

The Court should reverse the Ninth Circuit and hold that Section 306(1)(d) of the 4-R Act does not apply to ad valorem taxes.

Respectfully submitted

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### *Florida Ad Valorem Valuations & Tax Data December 1992* (Florida Department of Revenue, Division of Ad Valorem, 1992)

TABLE 2	COMPARATIVE STATEMENT OF 1992, 1991, 1990 AND 1989 TAX ROLLS
	JUST VALUES - PERSONAL PROPERTY ONLY
	1992 VALUE
TOTALS:	78,377,229,503
TABLE 22	COMPARATIVE STATEMENT OF 1992, 1991, 1990 AND 1989 TAX ROLLS
	INSTITUTIONAL EXEMPT VALUE - PERSONAL PROPERTY ONLY
	1992 VALUE
TOTALS:	2,134,847,012
TABLE 23	COMPARATIVE STATEMENT OF 1992, 1991, 1990 AND 1989 TAX ROLLS
	GOVERNMENT EXEMPT VALUES - PERSONAL PROPERTY ONLY
	1992 VALUE
TOTALS:	15,633,699,273

# 1992 JUST VALUE OF REAL PROPERTY BY CATEGORY

RESIDENTIAL		MOBILE		MULTI FAMILY	
VACANT	SGL FMLY	HOMES	10 UNITS	9 UNITS	
TOTALS:	26,762,470,621	226,633,552,486	9,333,473,446	11,792,808,957	16,949,715,443

## 1992 JUST VALUE OF REAL PROPERTY BY CATEGORY - CONT'D

CONDOMINIA	COOPERATIVES
TOTALS:	74,409,607,031

## 1992 JUST VALUE OF REAL PROPERTY BY CATEGORY - CONT'D

RETIREMENT HOMES	VACANT COMMERCIAL	IMPROVED COMMERCIAL	VACANT INDUSTRIAL
TOTALS:	1,821,400,780	8,263,905,578	78,726,589,462

## 1992 JUST VALUE OF REAL PROPERTY BY CATEGORY - CONT'D

IMPROVED INDUSTRIAL	AGRICULTURAL
TOTALS:	18,356,330,600

App. 2

# 1992 JUST VALUE OF REAL PROPERTY BY CATEGORY - CONT'D

INSTITUTIONAL	GOVERNMENT	LEASEHOLD	MISCELLANEOUS
TOTALS:	15,215,857,929	51,976,652,917	1,034,809,218

App. 3

## 1992 JUST VALUE OF REAL PROPERTY BE CATEGORY - CONT'D

NON - AG	TOTALS
TOTALS:	6,885,293,447

594,292,292,052



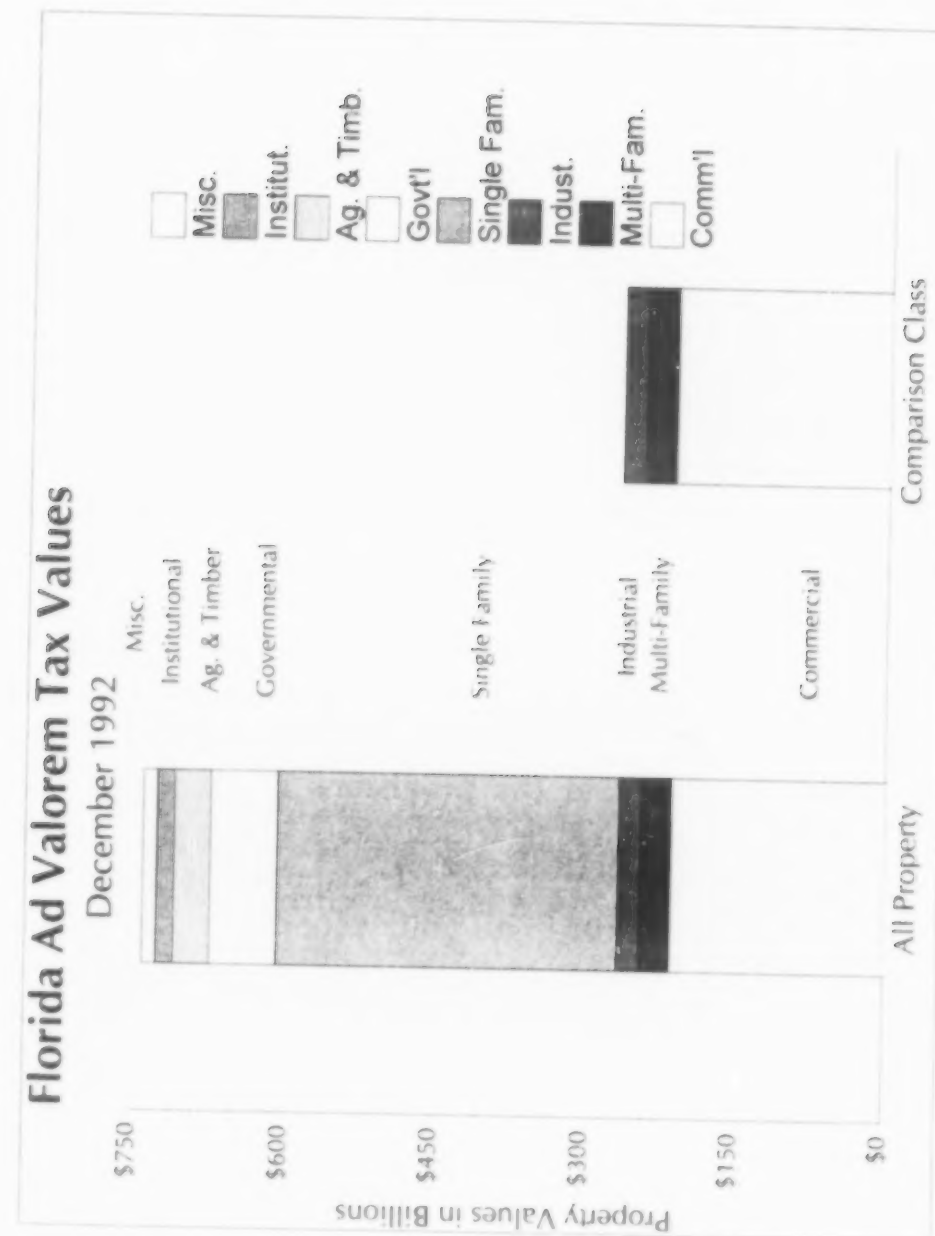
# App. 4

## Florida Ad Valorem Valuations and Tax Data December, 1992

	All Property in \$ billions	§ 306(1)(d) Comm'l & Ind. (w/o exemptions)
<b>Real Property</b>		
Multi-Family Resid.	28.7	28.7
Retirement Homes	1.8	1.8
Vac. Commercial	8.3	8.3
Commercial	78.7	78.7
Vacant Industrial	2.8	2.8
Industrial	18.4	18.4
Governmental	\$52.0	N/A
Institutional	15.2	N/A
Residential		
Vacant	26.7	N/A
Single Family	226.6	N/A
Mobile Homes	9.3	N/A
Condominia	74.4	N/A
Cooperative	2.8	N/A
Agric. (incl. Timb.)	35.5	N/A
Misc.	5.0	N/A
Non-Ag.	6.9	N/A
Leasehold	1.0	N/A
<b>Subtotal: Real</b>	<b>\$594.1</b>	<b>\$138.7</b>
<b>Personal Property</b>		
Taxable Tang.	\$78.4	\$78.4
Inventory *	50.0	50.0
Governmental	15.6	N/A
Institutional	2.1	N/A
<b>Subtotal: Personal</b>	<b>\$146.1</b>	<b>\$128.4</b>
<b>Total Real &amp; Personal</b>	<b>\$740.2</b>	<b>\$267.1</b>

\* Inventory estimated from 1982 data developed by experts engaged on remand of Trailer Train v. Dep't of Rev., State of Florida, 830 F.2d 1567 (11th Cir. 1987). Trailer Train's expert estimated \$21.2 billion. Florida D.O.R.'s expert estimated \$16.3 billion. The \$50 billion is based on the higher figure and includes growth from 1982 to 1992.

# App. 5



## S. 2289

That the Interstate Commerce Act, as amended, is amended by inserting after section 25 thereof a new section 25a as follows:

"Sec. 25a. (1) Notwithstanding the provisions of section 202(b), the following action by any State, or subdivision or agency thereof, whether such action be taken pursuant to a constitutional provision, statute, or administrative order or practice, or otherwise, is hereby declared to constitute an unreasonable and unjust discrimination against and an undue burden upon interstate commerce and is hereby forbidden and declared to be unlawful: (a) the assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property owned or used by any common or contract carrier subject to economic regulation pursuant to the provisions of the Interstate Commerce Act at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the taxing district subject to a property tax levy bears to the true market value of all such other property; (b) the collection of any tax on the portion of said assessment so declared to be unlawful; or (c) the collection of any ad valorem property tax on such transportation property at a tax rate higher than rates applicable to any other property in the taxing district.

"(2) Notwithstanding the provisions of section 1341, title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall

have jurisdiction, upon complaint and after hearing, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain any State, or subdivision or agency thereof, or any person from doing anything or performing any act declared by paragraph (1) hereof to be unlawful: *Provided, however,* That such jurisdiction shall not be exclusive of that which any Federal or State court may otherwise have: *And provided further,* That the provisions of this paragraph (2) shall not become effective until three years after the date of enactment."

## S. 2718

Sec. 207. Part I of the Interstate Commerce Act is amended by redesignating section 27 thereof as section 28 thereof and by inserting after section 26 thereof a new section 27, as follows:

"Sec. 27. (a) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts: "(1) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial

and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(2) The levy or collection of any tax on an assessment which is unlawful under paragraph (1).

"(3) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(4) The imposition of any other tax which results in discriminatory treatment of a common or contract carrier subject to this part I, part II, part III, or part IV of this Act.

"(b) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that (1) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection; (2) the provisions of this section shall not become effective until 3 years after the date of enactment of this section; (3) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percent the ratio assessed value to true market value, with respect to

all other commercial and industrial property in the same assessment jurisdiction; (4) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and (5) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study, conducted in accordance with statistical principles applicable to such studies, to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(c) As used in this section, the term -

"(1) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(2) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a



unit for purposes of determining the assessed value of property for ad valorem taxation;

"(3) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(4) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common or contract carrier subject to economic regulation under part I, II, III, or IV of this Act, or which is owned by the National Railroad Passenger Corporation.

"(d) The provisions of this section shall not apply in any State which on the date of enactment of this section, has in effect a provision of its constitution (or an amendment thereto) which provides for the reasonable classification of property for State purposes."

#### H.R. 10979

Sec. 601. Part I of the Interstate Commerce Act is amended by redesignating section 28, as redesignated by section 205 of this Act, as section 29, and by inserting immediately after section 27 the following new section:

#### DISCRIMINATORY STATE TAXATION

"Sec. 28. (1) Any of the following actions by any State, or subdivision or agency thereof, whether any such

action be taken pursuant to a constitutional provision, statute, or administrative order or practice, or otherwise, is declared to constitute an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce and is forbidden and declared to be unlawful:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described in paragraph (3)), for purposes of a property tax levied by any taxing district, of transportation property owned or used by a carrier by railroad subject to this part at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other commercial and industrial property (located in the assessment jurisdiction of any State in which is included such taxing district and subject to a property tax levy) bears to the true market value of all such other commercial and industrial property.

"(b) The collection of any tax on the portion of such assessment so declared to be unlawful.

"(c) The collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the taxing district.

"(d) The imposition of any other tax which results in discriminatory treatment of a carrier by railroad subject to this part.

"(2) As used in this section -

"(a) The term 'transportation property' means transportation property, as defined in the regulations of

the Commission, owned or used by a carrier by railroad subject to this part.

"(b) The term 'assessment jurisdiction' means a geographical area, such as a State, or a county, city, or township within a State, which is a unit for purposes of determining assessed value of property for ad valorem taxation.

"(c) The term 'commercial and industrial property' means property devoted to a commercial or industrial use, except that such term shall not include land used primarily for agricultural purposes or primarily for the purpose of growing timber.

"(d) The term 'all other property' means all property, real or personal other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber.

"(3) In the event that the ratio of the assessed value of all other commercial and industrial property in the assessed jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study, conducted in accordance with statistical principles applicable to such studies, to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then it shall be unlawful (a) to assess such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property (located in the assessment jurisdiction in which is

included such taxing district and subject to a property tax levy) bears to the true market value of all such other property, or (b) to collect any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(4) Notwithstanding the provisions of section 1341, title 28, United States Code, or of the constitution of laws of any State, the district courts of the United States shall have jurisdiction, upon complaint and after hearing, to issue such writs of injunction of other property process, mandatory or otherwise, as may be necessary to restrain any State, or subdivision or agency thereof, or any person from doing anything or performing any act declared by paragraph (1) to be unlawful, except that such jurisdiction shall not be exclusive of that which any Federal or State court may otherwise have. No relief shall be granted under this subsection unless the assessment percentage applied to transportation property exceeds by at least 5 per centum the assessment percentage applied to all other property in the assessment jurisdiction. The provisions of this section shall not become effective until 3 years after the date of its enactment."

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No. 4:90CV-60406

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IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

The Burlington Northern Railroad Company

*Plaintiff,*

vs.

Gerald D. Bair, Director of the  
Department of Revenue of Iowa,*Defendant.*


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RULING AND ORDER

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The Burlington Northern Railroad Company (BN or the railroad) brings this action under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (§ 306 or 4-R Act), codified at 49 U.S.C. § 11503, against Gerald Bair, the Iowa Director of Revenue and Finance (Director), seeking relief from alleged discriminatory real property taxes for the 1989 assessment year. Section 306 prohibits the imposition of any discriminatory tax on railroads or rail property, confers federal court jurisdiction and creates an express federal injunctive remedy to enforce such prohibition.<sup>1</sup>

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<sup>1</sup> [Text of 49 U.S.C. § 11503 omitted.]

These same parties were involved in similar litigation in this court for tax years 1981 and 1982.<sup>2</sup> After remand from the Eighth Circuit Court of Appeals, this court, in an effort to determine the fair market value of BN's real property in Iowa, stated several principles to guide the parties in making necessary computations. The cases were settled without further litigation. Both parties claim to rely in this litigation upon those principles set forth by the court.

BN claims that the taxes assessed against it by the State of Iowa for the tax year 1989 violate section 306 in four respects:

- A. The Director overvalued BN in violation of section 306(1)(a);
- B. The Director undervalued comparative commercial and industrial property in violation of section 306(1)(a);
- C. The Director improperly apportioned BN's value between real and personal property resulting in BN being assessed on tangible personal property in violation of section 306(1)(d);
- D. The Director improperly taxed BN's intangibles compared with other commercial and industrial intangibles in violation of section 306 (1)(d).

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<sup>2</sup> *Burlington N. R.R. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984) (hereafter *Bair I*), *aff'd in part*, 766 F.2d 1222 (8th Cir. 1985) (hereafter *Bair II*), *on remand*, 648 F. Supp. 91 (S.D. Iowa 1986) (hereafter *Bair III*).



The Director denies that BN was discriminated against in any way by the real property tax imposed on BN by the State of Iowa.

Several factors combined make the resolutions of these claims complex and difficult. Although the parties agree that BN should be valued on a business enterprise basis as a unit, and they agree on the portion of that value assignable to the State of Iowa, the Director valued BN's rail transportation property at \$4.9 billion while BN claims its true market value did not exceed \$2.5 billion. The court must arrive at its own true market value. Because Iowa does not tax most of the personal property in the state, it is necessary to determine what portion of BN's true market value assigned to Iowa is personalty. It must also be determined whether intangible personal property is actually tax in Iowa, and if not, what can be considered intangible personalty and its value. The court must also determine what value the intangibles contribute to the true market value of BN's Iowa property. According to the Eighth Circuit Court of Appeals, it is the responsibility of this court to weigh the evidence and make its own factual findings regarding valuations. *Bair II*, 766 F.2d at 1225-26. A formidable task.

#### IV.

#### INTANGIBLE PERSONAL PROPERTY DEDUCTION

When a railroad is valued as a unit on a business enterprise or going concern basis, that valuation necessarily includes intangible assets. If a state exempts most

personal property from ad valorem taxation, that exemption would include identifiable and quantifiable intangibles. In this case BN has identified and valued three kinds of intangible personal property: computer software, assembled work force, and long term coal hauling contracts.

BN claims that section 306 prohibits Iowa from including these intangibles in its valuation for tax purposes because Iowa does not tax intangible personal property of commercial and industrial taxpayers. The Director argues that going concern intangibles are assessed in Iowa as real property because of local assessors capture intangibles in the assessment of real estate. Therefore, BN has no claim under section 306 (1) (d) "even if methodologies for centrally assessed properties differ from commercial and industrial methodologies." The Director further argues that "the exclusion of *financial* intangibles from the [railroads'] unit value and the removal of personal property for railroads and the adjustments of the cost value for commercial and industrial real estate to account for sales price (by the county assessors) and sale ratios (by the Director) leave both parties similarly situated."

Assuming for the purposes of argument that such approach would leave the parties similarly situated, which is questionable, the evidence does not show that adjustments and sales ratios pick up the value of commercial and industrial intangibles. Computer software, assembled work force and coal contracts have some value that remains in BN's unit value and make some contribution toward the cash flow. The Director's evidence that

there are adjustments to the value of commercial and industrial real estate to account for the sales price to include such intangibles is not persuasive. The court holds that Iowa does not tax identifiable intangibles as real estate.

*A. Taxation of Commercial and Industrial Intangibles*

Section 441.21 (2), Code of Iowa, provides that "the special value or use value of the property to its present owner, and the good will or value of a business which uses the property as distinguish from the value of the property as property" shall not be considered in determining market value.

The railroad has been valued as a business and the intangible personal properties involved here are components of that value. It appears that the foregoing statute and Iowa case law, *Heritage Cablevision v. Board of Review*, 457 N.W. 2d 594, 598 (Iowa 1990), prohibit the assessor from considering such intangibles when appraising commercial and industrial property. Thus BN is being discriminated against unless commercial and industrial intangibles are being taxed in violation of the statute.

In *Heritage*, the Iowa Supreme Court approved of the following statement from the district court.

[W]hile the market approach method utilized by Kocer may have validity if he were attempting to determine the market value of the *system*, it does not follow that the method accurately determines the value of *taxable assets*. That is, the court concludes that the total fair market

value of the system necessarily includes nontaxable assets such as a franchise to operate, an established customer base, experienced personnel in place, goodwill, and other intangibles.

*Id.* at 598.

The supreme court then said:

We believe the district court's conclusion concerning these comparable sales was valid. The evidence suggests that a cable television system, as a going business enterprise, can generate tremendous income for the owners. We believe that the valuations which Kocer derived from these sales failed to exclude the substantial value which the buyers were receiving from the business enterprise with which the taxable assets were associated. Kocer attempted to determine that portion of the total price paid for other cable television systems as going concerns which was attributable to the taxable assets. He did so by taking the franchise fee payable to the governmental body, capitalizing that sum and subtracting the latter figure from the total sale price. We do not believe this adjustment produced a figure which is in any way representative of the fair and reasonable exchange between a willing buyer and willing seller of only the taxable assets.

*Id.* at 599.

The Director relies heavily on *Maytag Co. v. Partridge*, 210 N.W. 2d 584, 590 (Iowa 1973). At that time section 428.22 of the Iowa Code provided that machinery used in manufacturing establishments shall for the purpose of taxation be regarded as real estate. The issues in *Maytag* were quite different. Maytag argued that machinery used

in its operation should be valued and taxed at the market price of used machinery for sale. The Iowa Supreme Court rejected this claim and approved of the assessor recognizing the effect of the machinery's use on the value of the property itself. *Maytag* acknowledged that intangibles were not to be taxed. *Id.* at 590.

In *Heritage* the court said:

The application of the "going concern" principle in *Maytag Co.* was in the context of rejecting the property owner's claim that its machinery should be valued exclusively by a market data analysis of the used machinery market. We approved the assessor's depreciated cost appraisal in that case under the "other factors" approach. We did not suggest in *Maytag Co.* that in trying to value taxable assets under a comparable sales analysis the statutory directives against considering "special value or use value of the property to its present owner, and the goodwill or value of a business which uses the property as distinguished from the value of the property as property" may be disregarded.

*Heritage*, 457 N.W. 2nd at 599.

The Director introduced testimony from local assessors and state officials attempting to show that the Declarations of Value included intangibles in the purchase price of real estate. The forms, if properly completed, would not include intangibles because they ask the price for real property only. If an intangible is listed, its cost is deducted from the total price. Intangibles may advertently be included in the gross price if not identified with a price. However, that in the court's opinion does not

change Iowa law that intangibles are not to be taxed as real estate.

The court rejects the Director's argument that intangibles are in fact taxed as part of the real estate in Iowa. The Iowa tax system does not tax intangible property as such.

#### B. Value of Intangible Assets

BN's experts identified intangible assets that contributed to BN's value as a business enterprise. The cost approach was used to value BN's computer software (\$176,000,000) and assembled work force (\$233,000,000). The income approach was used to value the coal contracts (\$263,000,000). The experts deducted these determined values dollar for dollar from their computed \$2.5 billion for the system as a whole. It is acceptable to use the cost approach to arrive at values for the computer software and the work force in place. The income approach is an appropriate way to value the coal contracts. But the dollar for dollar deductions from the unit value of the railroad is not the proper method to arrive at the value of BN's real property. Use of this procedure would mean that the value of BN's real estate would be whatever value is left after the computed values of tangible and intangible personal property are deducted from the unit value. For example, combining all of the claims advanced by BN in this litigation you come up with this very questionable result.



Unit value of the railroad	\$2,500,000,000
Less 50% as personal property	<u>\$1,250,000,000</u>
	\$1,250,000,000
Less value of intangibles	<u>\$ 672,000,000</u>
Value of real estate	\$ 578,000,000

This value for BN's operating real property is ridiculous. It operates one of the largest railroad systems in the United States. BN's system consists of 23,500 miles of operating track connecting the Midwest, the Pacific Northwest and the Gulf Coast. Under BN's approach the value of all its operating real property would be considerably less than the value of the identified intangibles, although the book value of the railroad real property is \$3,500,000,000.<sup>3</sup>

The value of BN's real estate cannot be determined by accepting the remainder of the unit value of BN after the values of these intangibles is computed and deducted. If separate values had been determined for the real property as well as tangible and intangible personal properties and all three added together and the result proportioned, it would have made some sense. But to say the value of the real estate is just what is left, is unacceptable. There is no proof of the relationship between these values and the market value of the railroad whether the income or stock and debt indicators are used. There is no proof of the contribution these intangibles made to the cash flow

<sup>3</sup> From page 7, Exhibit 61 -  
Net book value of the system  
Less personal property and  
operating leases

\$5,798,249,686  
2,299,220,686  
\$3,499,029,000

or the price of the stock. The court cannot accept the proposition that every dollar of their value went into the cash flow or stock price.

The court could therefore hold that BN has failed to establish by a preponderance of the evidence the contribution that these intangibles made toward the cash flow or the price of the stock of BN and deny it any relief from the state's taxation of these identified intangibles. However, these intangibles do have some value that should be recognized and the court believes there is evidence in the record by which their contribution to the cash flow and stock price can be considered, although there is no expert testimony supporting this analysis.

Why shouldn't intangible personal property be broken out of the unit value the same way tangible personal property is? Book values were used to determine the proportion of unit value represented by tangible personal property. BN's expert conceded that this is not a good method, but it is the best available method of taking particular assets out of the unit value. See footnote 12. The court will use the book values of the BN railroad and add the computed values of the intangibles, which have no book value, determine the percentage applicable to the intangibles and allow that percent as a deduction from true market value.<sup>4</sup> The net book values are taken from

<sup>4</sup> I realize that I am off on a "frolic of my own" in taking this approach but I am convinced it is the best result. I also realize I am combining book value with appraisals of true market value, but I could not accept the dollar for dollar deduction but I know the intangibles contributed to BN's value.

I also recognize that the valuation of intangibles will pose a serious problem for the Director. The expense of arriving at a

page 7 of Exhibit 61. The proportion attributable to intangibles is ten percent and the allowable deduction is \$67,200,000.<sup>5</sup>

....

## VI SUMMARY

In summary, I find and hold that:

....

16. Computer software, assembled work force and long term coal contracts are intangible assets that contribute to the value of BN.

17. Iowa does not tax intangible property as part of commercial and industrial real estate. Therefore, whatever value the railroad's intangibles contribute to BN's value as a business enterprise should not be taxed.

18. The appraised value of the intangibles cannot be deducted dollar for dollar from the true market value of BN as a business enterprise.

value for these assets that have no intrinsic value will be great. But, I do not see any way to avoid acknowledging that they have a value that should not be taxed as part of the real estate.

<sup>5</sup>

Net book value	5,798,249,686
Add value of intangibles	<u>672,000,000</u>
Total value	\$6,470,249,686
Value of intangibles	<u>672,000,000</u>
Total Value =	\$6,470,000,000 = 10.3%
	Round to 10%

19. Use of the net book cost basis to determine the proportion of BN's true market value attributable to these intangible assets results in ten percent of their appraised value or \$67,200,000.

....

The court has, with trepidation, made the foregoing calculations. However, the remaining calculations will be left to the expertise of the parties using the court's findings and holdings.

I cannot conclude this opinion without offering some gratuitous advice to the railroads, the states and the federal government. The 4-R Act was enacted to protect the railroads from discriminatory taxation by the states, a valid concern. However, the statute, as it now stands, has spawned considerable and very expensive litigation. The issues of national significance should be resolved on a national level. Different states should not have different unit values for the same interstate railroad. The percentage of that value consisting of tangible and intangible personal property for the specific railroad should be the same throughout the country. The statute should be amended to give the Interstate Commerce Commission, or other appropriate board or commission the authority and duty to value all interstate railroads and determine the percentages of that value attributable to tangible and intangible personal property. The states and the railroad should have input during the evaluation procedure and the right to appeal. But these issues should be resolved in one lawsuit between the interested states and the railroad. Those issues relating to taxation in a specific state,

like equalization, could still be tried in federal court in the state involved.

The changes suggested should save the railroads and the states considerable sums of money, treat all states and railroads equally and reduce the burden on federal courts.

The court directs BN to take the responsibility for the preparation of Order for Judgment in accordance with this Ruling and Order. It shall be submitted to the Director for his approval and then submitted to the court. If there is disagreement over the contents of such an order, the matter will be resolved by the court.

IT IS SO ORDERED.

Signed this \_\_\_\_ day of March, 1993.

/s/ \_\_\_\_\_  
W. C. STUART, Senior Judge  
Southern District of Iowa.

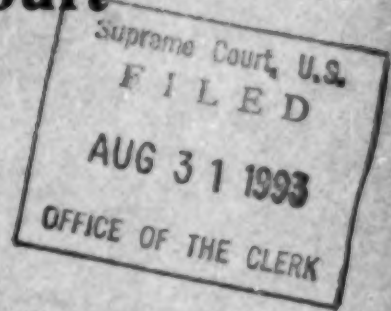
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# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1993



DEPARTMENT OF REVENUE OF THE STATE OF OREGON,

*Petitioner,*

VS.

ACF INDUSTRIES, INC., ET AL.,

*Respondents.*

On Writ of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

Brief of Amici Interstate Air Carriers  
In Support of Respondents

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United Parcel Service, and USAir, Inc.

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# In the Supreme Court

OF THE  
**United States**

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OCTOBER TERM, 1993

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
*Petitioner,*

VS.

ACF INDUSTRIES, INC., ET AL.,  
*Respondents.*

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On Writ of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

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Brief of Amici Interstate Air Carriers  
In Support of Respondents

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## INTEREST OF AMICI INTERSTATE AIRLINES

The question presented here is whether the commercial and industrial property that states have chosen to favor through tax "exemptions" must be taken into account in applying Congress' mandate in 49 U.S.C. section 11503 ("4R Act"), prohibiting tax discrimination against interstate railroads.

Amici interstate airlines have a direct interest in this issue because Congress has also prohibited the discriminatory taxation of airlines in 49 U.S.C. section 1513(d) ("Airline Act"), as well as motor carriers in 49 U.S.C. section 11503a ("Motor Carrier

Act").<sup>1</sup> Although the three acts share the same purpose and much of the same language, the Airline and Motor Carrier Acts have no counterpoint to the "catch all" provision in the 4R Act, 49 U.S.C. section 11503(b)(4), at issue here. Interstate air and motor carriers, however, are equally discriminated against when states "exempt" the commercial and industrial property of favored resident businesses, but do not take account of such exemptions in the tax burden they impose on interstate carriers.

The Court recognized the importance of this issue as to airlines when it noted probable jurisdiction of an appeal in *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987). The question there was whether "exempt" commercial and industrial property must be considered in determining the extent of assessment ratio discrimination under the Airline Act. Ultimately, *Western Air Lines* was decided on other grounds. But the importance of that question remains, and it is still unresolved.

The interstate airlines ask to be heard here because the parties and the Solicitor General have assumed the point that will govern the question as to the airlines. Because of their focus on the "catch-all" provision, all parties incorrectly assume that the definition of "commercial and industrial property" in the 4R Act—which is identical to the definition of "commercial and industrial property" in the Airline and Motor Carrier Acts—does not allow "exempt" commercial and industrial property to be considered in an assessment ratio analysis.

That question, however, was not briefed or decided in the courts below and has not been presented to this Court in the present case. It is therefore a question that the Court need not and should not decide, particularly since the interstate carriers that have the greatest interest in its resolution—interstate air and motor carriers—are not before the Court. As the airlines further show, the parties' assumption that the assessment ratio provisions of the 4R Act cannot reach the assessment ratio discrimination

<sup>1</sup> Amici interstate airlines appear pursuant to the written consent of the parties. Fed.S.Ct. Rule 37.3 Letters of consent are on file with the Court.

caused when other commercial and industrial property is "exempt" from taxation, is incorrect.

## SUMMARY OF ARGUMENT

1. The airlines agree with the Solicitor General that Congress enacted the 4R Act to stop the discriminatory tax treatment of interstate rail carriers and to protect the national interest in a sound and viable network of interstate commerce. Congress enacted the Motor Carrier Act and then the Airline Act for the same purposes. The airlines also agree that state and local tax systems that provide property tax exemptions for other commercial and industrial taxpayers, but not interstate carriers, result in carriers bearing a disproportionate share of the state and local property tax burden and are discriminatory. Finally, the airlines agree with the Solicitor General that the anti-discrimination statutes must be interpreted to prevent this form of tax discrimination. Otherwise, as the Solicitor General observes, Congress' anti-discrimination mandates will be a "self-defeating scheme under which the States could discriminate . . . by the simple artifice of exempting all other types of property from the property tax base." (USA Bf. at 8)

2. Neither the Airline Act nor the Motor Carrier Act includes a "catch all" provision like subsection (1)(d) of the 4R Act, which is at issue here. Compare 49 U.S.C. §§ 1513(d)(1) and 11503a(b), with 11503(b). Congress could not have meant, however, that unlike the 4R Act, the Airline Act and the Motor Carrier Act would be self-defeating and ultimately hollow protections against discriminatory tax treatment. For this reason, the North Dakota Supreme Court held that the assessment ratio provisions of the Airline Act *do* protect interstate air carriers from the tax discrimination that results when other commercial and industrial property, but not air carrier property, is exempt from taxation. *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W.2d 515 (N.D. 1984).<sup>2</sup>

<sup>2</sup> Because the assessment ratio provisions in the Motor Carrier Act are virtually identical to those in the Airline Act [compare 49 U.S.C. §§ 1513(d)(1)(A) and 11503a(b)(1)], under *Northwest Airlines* inter-



3. The meaning and scope of the assessment ratio provisions in the Airline and Motor Carrier Acts is not a question that is before the Court. These provisions, however, are nearly identical to the assessment ratio provisions in subsection (1)(a) of the 4R Act [49 U.S.C. § 11503(b)(1)], which the parties and the Solicitor General have *assumed* do not provide a means to deal with discriminatory tax exemption schemes. Because the question of relief under the assessment ratio provisions has not been squarely presented, and because neither of the class of carriers to whom that question matters the most—interstate air carriers and motor carriers—are before the Court, it should not decide the question either explicitly or implicitly on the record before it.

4. If the Court does reach this question, the parties' and Solicitor General's assumption that exemption discrimination cannot be addressed under the assessment ratio provisions of the interstate carrier acts is unfounded. Congress' purpose and objective in enacting all three anti-discrimination statutes, as well as the legislative history of these acts, demonstrate that Congress did not intend that state and local taxing authorities could shift the property tax burden to interstate carriers by the simple expedience of exempting other commercial and industrial taxpayers from taxation. Congress intended to exclude traditionally exempt property, such as government owned and church property, from the comparison class. It did not intend to extend an invitation to states to exclude significant portions of commercial and industrial property from the comparison class through a proliferation of newly created "exemptions," perpetuating the very tax inequity Congress sought to eradicate.

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state motor carriers are likewise protected against this kind of discriminatory tax practice.

## ARGUMENT

### I. Congress Enacted The 4R Act, Motor Carrier Act And Airline Act To Protect The National Interest In A Strong And Stable Network Of Interstate Commerce

#### A. Congress Was Required To Act Because Of Rampant Tax Discrimination Against Interstate Carriers By The States

The airlines need add little to the Solicitor General's discussion as to why Congress enacted the 4R Act and later, the Motor Carrier and Airline Acts. In its initial study of the problem, Congress soundly took state and local taxing authorities to task for imposing significantly higher property taxes on interstate carriers than they imposed on other businesses. S. Rep. No. 445, 87th Cong., 1st Sess. 458 (1961) ("Doyle Report"). This discriminatory practice was so widespread, Congress described state and local taxing authorities as having a "studied and deliberate practice" of assessing interstate carrier property at a proportionally higher value than other business property. S. Rep. No. 445, at 458. As the Senate Committee on Commerce subsequently observed, the carriers were "easy prey for State and local tax assessors" in that they "are nonvoting, often nonresident targets for local taxation" who cannot remove themselves from the locality. S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969).

Because of this discrimination, interstate carriers paid approximately \$1 billion more than their fair share of state and local property taxes from 1960 to 1969. S. Rep. No. 1085, 92d Cong., 2d Sess. 3 (1972). More than a decade later, in 1975, Congress found that rail carriers alone were still over-taxed by at least \$50 million each year. H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

To put an end to this exploitive taxation — after years of unheeded warnings — Congress took the extraordinary step of "assuming control" over the tax burden imposed on interstate carriers. S. Rep. No. 445, at 466. In 1976, Congress passed the 4R Act, prohibiting state and local taxing authorities from imposing discriminatory taxes on interstate rail carriers. Pub. L. No. 94-210, § 306, 90 Stat. 31, 54-55 (now codified at 49 U.S.C.

§ 11503). In 1980, it passed the Motor Carrier Act, prohibiting state and local taxing authorities from imposing a discriminatory tax burden on interstate motor carriers. Pub. L. No. 96-296, § 31, 94 Stat. 793, 823-24 (codified at 49 U.S.C. § 11503a). And, in 1982, Congress extended anti-discrimination protection to interstate air carriers through provisions of the Airport and Airway Improvement Act. Pub. L. No. 96-248, § 532(b), 96 Stat. 671, 701-02 (codified at 49 U.S.C. § 1513(d)). Because the three Acts are part of a comprehensive legislative scheme to accomplish the singular objective of fostering a sound network of interstate commerce, the extensive legislative history of the 4R Act is directly relevant to construing and applying the Motor Carrier and Airline Acts. *E.g.*, *Western Air Lines*, 480 U.S. at 131.

**B. "Exempting" Other Commercial And Industrial Property From Property Taxation Without Comparable Treatment Of Carrier Property Is Another Form Of Tax Discrimination Against Interstate Carriers**

The airlines also agree with the Solicitor General that Congress meant to prevent "tax discrimination . . . in any form whatsoever" and that exempting other commercial and industrial property from taxation "is the most obvious form of tax discrimination" against interstate carriers. *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981); *see also Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) (in enacting 4R Act "Congress possessed a general concern with discrimination in all its guises").

By giving favored tax status to resident commercial and industrial taxpayers, state and local taxing authorities can accomplish exactly the shift in the property tax burden Congress intended to eliminate. Carried to its logical conclusion, states could shift the entire property tax burden to interstate carriers by "exempting" all other commercial and industrial property from taxation. And in fact, some states have come close to doing just that with respect to the tax burden on personal property by exempting all or virtually all other commercial and industrial personal property from taxation and taxing only carrier personal property. *E.g.*,

*Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 470 (8th Cir. 1983) (virtually all locally assessed personal property exempt from taxation); *Ogilvie*, 657 F.2d at 210 (all other commercial and industrial personal property exempt from taxation); *Northwest Airlines*, 358 N.W. 2d at 516 (virtually all other commercial and industrial personal property exempt from taxation).

This kind of discrimination adversely impacts rail, motor and air carriers, alike, and the threat that it poses to a broad and stable network of interstate commerce is as real today as when Congress passed legislation to stop it. It is no secret that many air carriers, for example, have filed or are on the verge of filing for bankruptcy. And a special task force created by President Clinton just concluded that interstate carriers are facing extraordinarily difficult financial times, that this is a matter of serious national concern, and that further federal action is needed to help return fiscal stability to this sector of the national transportation network. Nat'l Comm. to Ensure a Strong Competitive Airline Industry, *Change, Challenge, and Competition*, A Report to the President and Congress (August, 1993).

Personal property tax exemptions, which have become one of the most common forms of property tax exemptions, impact air carriers particularly hard. Unlike railroads, airlines do not own track, railroad yards or passenger terminals. Rather, their property is largely personal property, principally aircraft. Thus, when other commercial and industrial personal property is exempt from state and local property taxation, but airline property is not, the air carriers are effectively singled out and forced to carry a disparate share of the state and local personal property tax burden. That is patently discriminatory and exactly the kind of disproportionate taxation Congress intended to stop.

**II. The Important Question Of Whether Relief From Discriminatory Exemption Schemes Is Proper Under The Assessment Ratio Provisions Of The Interstate Carrier Acts Has Not Been Presented Here, And The Court Should Not Decide It On this Record**

Consistent with Congress' purpose in enacting the 4R Act, the courts have routinely granted relief to interstate rail carriers and



other related businesses like respondent carline companies, where state and local taxing authorities have "exempted" other commercial and industrial taxpayers, but not railroads, from property taxation. The courts have done so under subsection (1)(d) of the 4R Act, the "catch all" provision, which states in pertinent part that state and local taxing authorities may not "impose another tax that discriminates against a rail carrier..." 49 U.S.C. § 11503(b)(4); e.g., *Trailer Train Co. v. Levenberger*, 885 F.2d 415, 416-18 (8th Cir. 1988); *Trailer Train Co.*, 710 F.2d at 471-73; *Ogilvie*, 657 F.2d at 209-10.

The airlines take no position as to whether subsection (1)(d) of the 4R Act can be read to encompass relief from discriminatory exemption schemes. However, they do assert that regardless of whether this pernicious form of property tax discrimination can be redressed under the "catch all" provision in subsection (1)(d), it can be directly addressed in an assessment ratio analysis under subsection (1)(a).

The airlines address this question because the contrary assumption would probably mean that relief is not available under the assessment ratio provisions of the Airline and Motor Carrier Acts, since the assessment ratio provisions in all three statutes are virtually the same. 49 U.S.C. §§ 1513(d)(1)(A), 11503(b)(1), 11503a(b)(1). The Airline and Motor Carrier Acts, however, do not have a "catch all" provision like the 4R Act's subsection (1)(d). Compare 49 U.S.C. §§ 1513(d)(1) and 11503a(b), with 11503(b). Thus, an assumption that exempt commercial and industrial property is excluded from an assessment ratio comparison under subsection (1)(a) of the 4R Act necessarily implies that air and motor carriers can be discriminated against with impunity by the simple device of "exempting" other commercial and industrial taxpayers from taxation. Under that assumption, the Airline and Motor Carrier Acts would be, to use the Solicitor General's words, "illogical and self-defeating." (USA Bf. at 8)

That is an untenable construction of these Acts. But that is also a question that the Court need not and should not reach. As the Solicitor General has observed, the question of the interpretation and scope of the assessment ratio provisions of the 4R Act has never been raised by the parties, and the question has not been

presented to this Court as an issue for it to decide. (Pet. Bf. at 9-10; USA Bf. at 10 n.14) Accordingly, whatever the Court may hold with respect to subsection (1)(d) of the 4R Act, it should not decide on this record the weighty question of the proper interpretation and scope of the Act's assessment ratio provisions, particularly since neither of the carriers that question most directly impacts — air and motor carriers — are before the Court.

### III. To Effectuate Congress' Purpose In Enacting Anti-Discrimination Legislation, Relief From Discriminatory Exemption Schemes Must Be Available Under The Assessment Ratio Provisions Of The 4R Act, The Motor Carrier Act And The Airline Act

Although the airlines urge the Court not to reach the question, they also touch on some of the arguments that bear on how that question should be decided in the event the Court considers it. The airlines do so because the parties and the Solicitor General are mistaken in their assumption as to the scope of the assessment ratio provisions in the 4R and other interstate carrier Acts.

Their assumption that discriminatory exemption practices cannot be redressed under the 4R Act's assessment ratio provisions is based on the Act's definition of "commercial and industrial property," which is the property to which interstate carrier property is to be compared in determining the extent of assessment ratio discrimination. "Commercial and industrial property" is defined in all three Acts as "property other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. §§ 1513(d)(2)(D), 11503(a)(4), 11503a(a)(4).

The Solicitor General and the parties assume that exempt property is not "subject to a property tax levy" and conclude that the disparity in the tax burden caused by exempting other commercial and industrial property from taxation is therefore not covered by the 4R Act's assessment ratio provisions. (Pet. Bf. at 26; USA Bf. at 5 n.10) While Oregon claims that this conclusively demonstrates that Congress placed no limits on the states' ability to shift the property tax burden to interstate carriers



through exemptions, the Solicitor General maintains that this demonstrates why relief must be available under the 4R Act's "catch all" provision.

Yet, the justification the Solicitor General offers in urging that relief from discriminatory exemption practices must be available under subsection (1)(d) is the very reason why such relief must be available under the assessment ratio provisions of the Airline Act and Motor Carrier Act. As the Solicitor General correctly points out, if state and local taxing authorities have an unfettered license to exclude any and all commercial and industrial property from the comparison class through "exemptions," as Oregon claims to have a right to do, they can effectively shift a disproportionate share of the state and local property tax burden back onto interstate carriers. This, of course, would wholly defeat Congress' purpose in enacting anti-discrimination legislation. By the same token, Congress could not have intended that *only* the 4R Act provides meaningful protection against discriminatory tax practices and that the other two anti-discrimination statutes it passed to protect the national interest in a sound network of interstate commerce, the Airline and Motor Carrier Acts, are meaningless.

As shown below, the plain meaning of the statutory language is not what the parties and the Solicitor General assume it to be. The more plausible construction — and the one compelled by Congress' purpose in enacting the legislation and by the legislative history — is that "subject to a property tax levy" refers to all property that is within the jurisdiction of a taxing authority that can be taxed, and not just the property that a taxing authority chooses to tax at a particular time. But even if the statutory language is given the meaning the parties have suggested, its import must be limited in scope, and the language cannot be read to lead to the absurd result that inheres in their interpretation of it.

**A. Congress Did Not Intend To Give States A License To Perpetuate Discrimination Against Air And Motor Carriers By Excluding From The Comparison Class Whatever Local Commercial And Industrial Property They Wish To Favor**

The parties and the Solicitor General have simply assumed without analysis that the phrase "subject to a property tax levy" is free from doubt and necessarily means property that "is taxed." But "subject to" has numerous meanings, including being "under the jurisdiction of." *E.g.*, *The Random House Dictionary of the English Language*, Second Edition (unabridged) (1987). While property may be under the jurisdiction of the states and within their taxing power, they may for any number of reasons elect not to exercise that power. The property nevertheless remains "subject to" levy. Indeed, "subject to" more typically connotes the potential for an occurrence, *i.e.*, the Florida coast is "subject to" hurricanes, than it does the actual occurrence. *Id.* Thus, if Congress had meant only commercial and industrial property that in fact "is taxed," it would have said so.<sup>3</sup>

Moreover, as this Court has noted, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *FBI v. Abramson*, 456 U.S. 615, 625 and n.7 (1982), quoting *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). When viewed in context and in light of the legislative history, it is apparent that

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<sup>3</sup>Amici National Conference of State Legislatures, *et al.*, also recognize that the phrase "subject to a property tax levy" can mean a potential for taxation rather than property that is actually taxed. (NCSL Bf. at 11-12). While they argue that the inclusion of the article "a" and the word "levy" indicate that Congress meant only commercial and industrial property that "is taxed," these are distinctions without a difference. The operative language is "*subject to*," which connotes merely a potential for the assessment and collection of tax. Indeed, while amici note that Congress used the term "levy" elsewhere in the statute in conjunction with "collect" [49 U.S.C. § 11503(b)(2)], Congress did not preface its use of the term in that context with the phrase "subject to" as it did in defining "commercial and industrial" property [49 U.S.C. § 11503(a)(4)].

the phrase "subject to a property tax levy" cannot be read, as the parties assume, as meaning only that commercial and industrial property that is actually taxed at a particular time.

The "subject to" property tax levy language was first proposed in the "Doyle Report," the initial comprehensive report on the nature and extent of tax discrimination against interstate carriers. S. Rep. No. 445, at 465-66. That report also discussed what kinds of property had traditionally been exempt from taxation, such as that owned by federal, state and local governments, municipally owned utilities and fraternal societies. S. Rep. No. 445, at 452. These kinds of property have historically never been "subject to" tax. Indeed, in some instances such as federally owned property, the states are constitutionally prohibited from taxing it. *Id.*

This understanding of what property was "exempt" and excluded from the comparison class was underscored in the Senate Commerce Committee's subsequent report, where the Committee explained that the statutory language was "not intended to interfere [with] or restrict State action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like." S. Rep. No. 1483, 90th Cong., 2d Sess. 11 (1968). This view was repeated verbatim in yet a later report. S. Rep. No. 630, at 11. No analysis or report on the legislation ever departed from this understanding as to the kinds of exempt property that could be excluded from the comparison class without defeating Congress' objective to equalize the tax burden between other commercial and industrial taxpayers and interstate carriers.<sup>4</sup>

<sup>4</sup> The Solicitor General is therefore mistaken in suggesting that the "subject to a property tax levy" language was added in response to lobbying by the states to exclude all "exempt" commercial and industrial property from the comparison class. (USA Bf. at 20 n.24) As discussed above, this language appeared in the very first proposals set forth in the Doyle Report. The hearings to which the Solicitor General cites merely reflect the states' unrelenting—and ultimately unsuccessful [*see* discussion, *infra*, at 13]—efforts to convince Congress to allow them to "classify" real and personal property however they deemed fit and to tax each "classification" differently without taking such differences into account in their treatment of interstate carrier property. *E.g.*,

That Congress did not intend that states be able to shift the property tax burden by "exempting" whatever local commercial and industrial property they wanted to exclude from the comparison class, is further confirmed by Congress' refusal to accede to the states' demands that they be allowed to narrow the comparison class by "classifying" property and taxing each class differently. "Exempting" property from taxation altogether is simply the most extreme form of "classification."

The debate between Congress and the states over how much "classification" could occur went on for years. *E.g.*, S. Rep. No. 1483, at 5, 10-11; S. Rep. No. 630, at 11, 23-24; S. Rep. No. 1085, at 7. The states insisted that they had a sovereign right to segregate and treat various kinds of property differently and that they did not need to account for that difference in their taxation of interstate carrier property. *E.g.*, S. Rep. No. 630, at 8; *and see* Hearings cited, *supra*, at 12 n.3.

Congress disagreed and made only three adjustments to the comparison class. First, it recognized that real and personal property have historically been taxed differently, and it expressly approved of that limited "classification." *E.g.*, S. Rep. No. 1483, at 10-11. Second, it adopted the recommendation of the Secretary of Transportation that the phrase "commercial and industrial"

4 Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 90th Cong., 1st Sess. 116 (1967) (letter from Oregon Tax Commission objecting that "each scheme of enforced uniformity at the federal level runs into the [states'] classification of property for ad valorem tax purposes"); 6 Hearings on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. (1969) (resolution and report of Western States Association of Tax Administrators opposing federal legislation because of "untenable impact" on states' "right to classify property"); 9 Hearings on H.R. 16245, 16251, 16316, 16357, 16411, 16639 and S. 2289 Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 899-90 (1970) (statement by California State Board of Equalization opposing federal legislation because it "actually interfere[s] with the proper classification of property by a State").



property be added to clarify that the comparison class did not include residential property. The Secretary observed that this addition would "permit the States to continue a *measure of classification*, if State law so permits, for differentially assessing property *unrelated to business or commercial use*." S. Rep. No. 630 at 24 (emphasis added).<sup>5</sup> Third, Congress expressly excluded agricultural and timber growing property from the definition of "commercial and industrial" property. *E.g.*, S. Rep. No. 1085, at 6-7.<sup>6</sup> Beyond that, it rejected every other effort — and there were many — to further limit the comparison class. *E.g.*, S. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976) (conference committee rejecting proposed amendment that would have made legislation

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<sup>5</sup> The Secretary made no suggestion that substituting the phrase "commercial and industrial" property in place of the phrase "all other" property then in the legislation, would make the phrase "subject to a property tax levy" redundant. Nor does it. Traditionally exempt property is frequently put to a use that is "commercial." Examples abound. A perfect one is the state owned liquor stores in Oregon. Government owned property has always been treated as tax exempt, but liquor sales are plainly commercial in nature. Likewise, charitable institutions frequently undertake "commercial" endeavors to generate revenue. Again, Oregon provides a ready example. The state taxing authorities challenged the Oregon YMCA's tax exempt status on the ground it was engaged in a "commercial" enterprise. After multiple rounds of litigation, the YMCA finally emerged with its exempt status intact. *Young Men's Christian Ass'n of Columbia-Willamette v. Department of Revenue*, 784 P.2d 1086 (Or. 1989); *In the Matter of the Appeal of YMCA Colombia-Willamette*, No. 90-1523 (Or. Dept. Revenue, March 23, 1992). Therefore, defining the comparison class as property put to a "commercial or industrial" use does not exclude all property that has been traditionally exempt from taxation.

<sup>6</sup> This was done, moreover, in the wake of complaints by the states that the proposed legislation would allow the railroads to benefit from widely used "green belt" tax preferences that included reduced rates and exemptions for agricultural and forest property. *E.g.*, 4 Hearings on S. 927, at 116, 119; 6 Hearings on S. 2289, at 86, 99-100. Had Congress meant to allow the exclusion of any other state favored commercial and industrial property, it would have said so.

inapplicable to any state having a constitutional provision allowing for "reasonable classification for state purposes").

Thus, what is evident from the entire legislative history is that Congress repeatedly *rejected* the states' efforts to narrow the comparison class by selectively removing whatever locally owned commercial and industrial property they wanted to favor. While Congress intended to exclude traditionally exempt property from the comparison class and to allow real and personal commercial and industrial property to be taxed differently, it plainly did *not* intend to allow the states to circumvent its anti-discrimination mandates through a proliferation of non-traditional "exemptions" or "classifications" of commercial and industrial property.

Oregon asserts, however, that other "legislative history" supports its contention that Congress meant to give states free rein to "exempt" any and all commercial and industrial property from the comparison class. This claim is based on statements made during floor debates by individual congressmen. (Pet. Bf. at 21) This Court has observed on more than one occasion that such individual political interplay is not a fair or accurate depiction of what Congress meant as a whole when it employed specific statutory language. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982). Rather, Congress' collective intent is most accurately reflected in the committee reports digesting and analyzing the proposed legislation. *Garcia*, 469 U.S. at 76; *Zuber v. Allen*, 396 U.S. 168, 186 (1969). Here, the committee reports repeatedly reflect that Congress did *not* intend to give states the right to exclude whatever commercial and industrial property they might be inclined to favor, to the corresponding detriment of interstate carriers.

Furthermore, the floor debates cited by Oregon had nothing to do with the assessment ratio provisions in the proposed legislation or the definition of "commercial and industrial" property, but rather, concerned the last minute addition of the "catch all" provision in subdivision (1)(d). 120 Cong. Rec. H-38, 373-74 (daily ed., Dec. 10, 1974) The question raised on the floor was whether *subdivision (1)(d)* would prevent states from granting exemptions or ban all tax preferences. *Id.* As sponsors of the 4R



Act explained, not even subdivision (1)(d) *prohibits* any such exemption practices. *Id.* States are free to exempt whatever property they want. But they cannot discriminate against interstate carriers when they do so and cannot single carriers out and demand that they pay property taxes when other local commercial and industrial taxpayers do not. *See* 120 Cong. Rec. H-38,756 (daily ed., Dec. 10, 1974).

**B. The Statutes Cannot Be Read To Lead To An Absurd Result And To Defeat Congress' Purpose In Enacting The Airline And Motor Carrier Acts**

This Court has also repeatedly stated that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). While the plain language of a statute is the starting point in this inquiry, "it is a familiar rule, that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of the makers." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975), quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). In short, the Court will not read a statute so as to "lead to absurd results." *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1939).

These time-honored and universal rules are directly applicable here, as the North Dakota Supreme Court recognized in *Northwest Airlines*, 358 N.W. 2d at 515. The North Dakota Court concluded that exempt commercial and industrial property must be a part of the assessment ratio analysis under the Airline Act in order to implement the "clearly stated legislative purpose to prohibit states from imposing discriminatory taxes on air carriers . . ." *Id.* at 516. The Court rejected the simple — and simplistic — argument by the state that exempt property was not "subject to a property tax levy," stating that:

The construction urged by the state would allow discriminatory taxation of [airline] property as long as a state imposed no tax at all on other commercial and industrial property. We cannot reasonably so construe the statute . . . [W]e cannot

assume that a law which completely exempts all property . . . except airline property . . . was not meant to be covered by the Act. Interpreting . . . § 1513(d) as the State would have us do would permit greater discrimination when the property is completely exempt than when it is taxed, but at a lower rate. That is unreasonable. *Id.* at 517.

Indeed, such a result leads to a "palpable absurdity" as Justice Henderson recognized in his dissent in *Western Air Lines, Inc. v. Hughes County*, 372 N.W. 2d 106 (S.D. 1985), *aff'd on other grounds*, *Western Airlines*, 480 U.S. at 123, where the South Dakota Supreme Court reached the opposite conclusion. After noting probable jurisdiction of an appeal by the carrier in that case, this Court did not reach the exemption question because it found the tax in dispute was a permissible "in lieu tax" under section 1513(d)(3). *Western Air Lines*, 480 U.S. at 129, 131-34. In his concurring opinion, however, Justice White stated that he thought the Court's "in lieu" disposition was unwarranted and the Court should have reached "the plainly improvident ground on which the South Dakota Supreme Court sustained the tax." *Id.* at 135 (White, J., concurring).

Thus, whether one looks at the plain language of the assessment ratio provisions of the three interstate carrier Acts, examines Congress' purpose in enacting them and their legislative history, or contemplates the absurd results that would follow if they do not reach the assessment ratio discrimination that occurs when states "exempt" other commercial and industrial taxpayers but not interstate carriers from property taxation, the result is the same. The only construction that accomplishes Congress' objective to equalize the tax burden on interstate carriers and other commercial and industrial taxpayers is one that limits the commercial and industrial property excluded from the comparison class to traditionally exempt property "such as churches, charitable institutions, homesteads, and the like." S. Rep. No. 1483, at 11. Otherwise, the anti-discrimination provisions of the Airline and Motor Carrier Acts can and will be readily defeated as states continue to move to "exempt" the commercial and industrial property of local businesses that they believe, from their parochial perspective, are more deserving than interstate carriers of a

lessened tax burden. That, however, is the very disparity in tax treatment that Congress intended to eliminate in order to protect the *national* interest in a strong and viable system of interstate commerce.

### CONCLUSION

The airlines ask that in interpreting the "catch all" provision of the 4R Act, this Court be sensitive to their concerns about the scope and meaning of the Airline Act. States should not be permitted to defeat Congress' purpose in passing that Act and the Motor Carrier Act as well, by discriminating against the carriers through the artifice of "exempting" the commercial and industrial property of favored local businesses.

Respectfully submitted.

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REPORT OF THE JOINT COMMISSION ON  
THE RAILROADS  
AND  
THE SHORT LINE RAILROADS  
AND  
THE AMERICAN SHORT LINE RAILROAD  
ASSOCIATION

REPORT OF THE  
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## INTEREST OF THE AMICUS CURIAE

The Railway Progress Institute ("RPI") is a non-profit association of companies that are closely connected with the railroad industry and that have a common interest in maintaining a strong national rail transportation system.<sup>1</sup> RPI is comprised primarily of companies that manufacture or supply railroad equipment or that furnish fleets of specialty railroad cars for use by railroads. The American Short Line Railroad Association ("ASLRA") is a non-profit association of over 400 "short line" railroads.<sup>2</sup> Short lines are small businesses that maintain and operate short portions of rail right-of-way which provide vital links between the major railroads and shippers throughout the nation. Short lines are an increasingly important component of the national transportation system because they fill a need to deliver rail services in areas the major railroads do not, or cannot, serve.

RPI and ASLRA file this brief<sup>3</sup> to urge that Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976<sup>4</sup> continue to be construed, as it has been by the lower courts, to protect railroad property from the destructive effect of discriminatory property taxation that necessarily arises when rail cars are taxed in full while most other commercial and industrial tangible personal property within a state remains untaxed.<sup>5</sup>

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<sup>1</sup> RPI members are listed in Appendix A to this brief; respondents are members of RPI.

<sup>2</sup> ASLRA members are listed in Appendix B to this brief. Some of the respondents own short lines and are members of ASLRA.

<sup>3</sup> The petitioner and respondents have consented to the filing of this brief. Letters of consent are on file with the clerk.

<sup>4</sup> Pub. L. No. 94-210, § 306, 90 Stat. 54, (1976) currently codified at 49 U.S.C. § 11503 (hereinafter, cited in its codified form as "Section 11503" and in its original text as "Section 306").

<sup>5</sup> See *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); *Department of Revenue, State of*

Section 11503 embodies a national policy of tax equality for railroads and rail property, which Congress found it necessary to enact in 1976 in order to rescue railroads from pervasive state and local tax discrimination. *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). The basic policy of Section 11503 is jeopardized by the position of Oregon, and the other state interests joining it as amici, which argues that discrimination by exemption is immune from remedy under Section 11503. If accepted, this view would open a loophole that would seriously undermine the efficacy of the statute. The rational application of Section 11503 is also threatened by certain aspects of the analysis of the court of appeals below. As the states argue, the Ninth Circuit analysis, if applied literally, might absolutely prohibit any property taxation of any railroad property, real or personal.

Section 11503 should not be construed, at either extreme, to be completely indifferent to massive exemption of non-railroad property or to totally prohibit property taxation of railroad property. Rather, Section 11503 should be construed to assure the equality of tax treatment of rail property which is shown to be absent in Oregon by stipulations that rail cars are taxed at full value while approximately 75% of all other commercial and industrial tangible personal property is not taxed. (Stip. ¶¶ 29, 37, J.A. at 18-19).

On this record, this Court should hold that a state's imposition of a full property tax on rail cars violates Section 11503(b)(4) when, at the least,<sup>6</sup> most of the other

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*Fla. v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981).

<sup>6</sup> The facts presented here involve non-taxation of far more than most other tangible personal property. Accordingly, in the view of RPI and ASLRA, this case on its facts does not present the question of the

commercial and industrial tangible personal property within that state remains untaxed by reason of exemption, under-reporting or under-assessment. This Court should affirm on this basis. Such a holding will allow a remedy for the personal property tax discrimination existing in Oregon, while preserving the ability of state and local governments to impose nondiscriminatory taxes on railroad real property.

Accordingly, RPI and ASLRA submit that the result of the case below should be affirmed, but the following aspects of the analysis of the Ninth Circuit should be modified:

First, the analysis that compared respondents' rail cars to both real and personal property should be rejected in favor of the more targeted analysis employed by the other federal courts of appeals. The taxation of railroad tangible personalty should be compared to the taxation of other business tangible personal property only.

Second, having adopted the foregoing analysis, this Court should not reach the Ninth Circuit's unnecessary generalization that discrimination arises whenever any non-railroad property is exempt. Instead, the Court should rule that Section 11503 requires railroads to be taxed only by taxes of general applicability that are, in fact, generally applied. At the least, this requirement is violated for a personal property tax on rail cars if most other business personal property is not taxed.

### SUMMARY OF ARGUMENT

1. An analysis of tax discrimination against rail cars under Section 11503 should be based on comparison to

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minimum amount of non-taxation of other tangible personal property which must exist before discrimination against rail cars may be found. The issue of a precise line of demarcation between discriminatory and non-discriminatory taxes is not truly ripe here and should be left to an appropriate case for decision.

other business tangible personalty only. Such a comparison, which has been adopted by the other lower courts, properly recognizes the general classification of property for tax purposes into three categories—real, tangible personal and intangible personal. These classifications are universally made because there are significant differences in the characteristics of real, tangible personal and intangible property which are important for tax purposes. Moreover, personal property represents a decreasing portion of the property tax base nationwide as many states have enacted complete exemptions of personal property or expanded their lists of partial exemptions. The record here, which shows that 75% of Oregon's business tangible personal property is untaxed, exemplifies the trend. Rail personal property, including rail cars, is excluded from this trend because, unlike most business property, it is centrally assessed. These distinctions require a separate analysis of tangible personal property.

Although the legislative history of Section 11503 is usually rendered redundant by the plain text of the statute, and is often inconclusive, legislative history explicitly reinforces the conclusion that personal property should be separately analyzed.

A combined real and tangible personal comparison, as urged by Oregon and adopted *arguendo* by the court of appeals, must be rejected on practical grounds. It tends to obscure discrimination against personal property by hiding it within the much larger mass of real property taxation. Furthermore, it improperly expands the relief to all rail property even though discrimination is found only because of the non-taxation of personal property.

A precisely targeted personal-to-personal comparison recognizes long-standing property tax classifications and current trends. It accords with legislative intent and avoids impractical results. As the lower courts have generally

recognized, it is the proper approach to analysis of discrimination against rail personalty.

2. Tax discrimination against rail cars under Section 11503 is shown, at the least, where most other tangible business personalty is not taxed. The stipulated facts here, which show railcars are fully taxed but 75% of the non-rail tangible personal property to be untaxed, lie at the core of the discrimination prohibited by Section 11503(b)(4). These egregious facts render the overly broad generalization of the court of appeals, that "any" exemption violates Section 11503 unnecessary to a resolution of this case.

The assertion of Oregon and several amici that they are protected by a deferential analysis under standards employed in constitutional cases is contradicted by the specific statutory prohibitions set forth in Section 11503.

Likewise, the hypothetical defense posited by the United States in its brief, consisting of unspecified justifications never yet urged by Oregon, is unsupported by the statute. Justification of taxes which result in discrimination against railroads is not contemplated by Section 11503, which in its original language at Section 306(1) included a specific declaration that such practices constituted "unreasonable and unjust" burdens on interstate commerce. In any case, even if justifications are possible, none has been or could be offered for the massively disparate treatment which Oregon has elected to impose upon rail cars.

Section 11503 prohibits taxes which result in discrimination against railroads. In a myriad of cases the lower courts have required that taxes be generally applicable and generally applied in order to be nondiscriminatory. The outer boundaries of these concepts have not been defined, and need not be defined here, because a personal property tax must be considered discriminatory when it is imposed on rail cars but not on 75% of other business tangible personal property.



## ARGUMENT

### I. RAILROAD TANGIBLE PERSONALTY SHOULD BE COMPARED TO OTHER COMMERCIAL AND INDUSTRIAL TANGIBLE PERSONALTY ONLY

RPI and ASLRA urge this Court to adopt other commercial and industrial tangible personal property as the proper comparison class for the purpose of analysis in this case. Such an analysis is consistent with the universal practice of classifying property for property tax purposes into three broad categories—real, tangible personal, and intangible personal.<sup>7</sup> It also accords with the expressed intent of Congress to recognize such classifications.

The combined real and tangible personal analysis urged by Oregon below, and partially accepted *arguendo* by the Ninth Circuit, disregards major differences in character and tax treatment between real and personal property. This, in turn, leads to strained and impractical results such as the specter raised by Oregon in this Court that its substantial non-taxation of personal property might be used as a basis to prohibit taxation not only of railroad personalty, but of railroad realty as well.

For these reasons the other lower courts, unlike the Ninth Circuit, have focused their inquiry solely on personal property in cases such as this. *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Department of Revenue, State of Fla. v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

<sup>7</sup> See e.g., 2 Bureau of the Census, U.S. Department of Commerce, 1987 *Census of Governments* No. 1, App. E, at pp. 2-3 (1989) (definitions of "property", "real property", "tangible personal property" and "intangible personal property".)

This analytic framework has proven workable in identifying obvious discrimination against railroad personal property and has likewise served as a sound basis to limit the relief in such cases to railroad personalty. By way of contrast, the blunt instrument of combined analysis appears to offer but two unappealing and extreme choices within its analytic framework. The Court must either disregard personal property tax discrimination or prohibit railroad property taxation altogether.<sup>8</sup>

In support of their position on this fundamental issue, RPI and ASLRA will discuss (a) the background of classification and treatment of personal property for tax purposes, (b) the pertinent legislative history of Section 11503, and (c) the practical effects of the selection of a comparison class on the analysis of the issues here.

#### A. BACKGROUND

The most important reason for separating the analysis of property among real, tangible personal, and intangible property categories under Section 11503 is a practical one. Such categories reflect fundamental distinctions that are universally recognized in the way property is listed, assessed and taxed both in Oregon and nationwide.

Real property substantially predominates the nationwide property tax base. United States Bureau of Census esti-

<sup>8</sup> A third choice might theoretically exist in that the Court might determine and decree a percentage level of taxation of railroad property that was somehow consistent with the tax burden on all other property. In effect, the Court would be forced to determine what it considered to be a proper level of tax. The lower courts have avoided such an approach, and it is fraught with serious practical difficulties. See, e.g., *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987). For example, how should untaxed intangibles be valued and included? How should partially taxed property or property subject to other taxes such as standing timber be considered? No good reason exists to enter such a thicket of uncertainty, for the sake of a broad analysis when a more narrow and precise method of analysis is available which conforms to the language and intent of Section 11503.

mates for 1986 show that 85.2% of the total nationwide property tax base was composed of locally assessed real property. Locally assessed tangible and intangible personal property was only 9.8% of the total.<sup>8</sup> Centrally assessed property, primarily utilities including railroads, accounts for the remaining 5%.<sup>10</sup> Intangibles represent a negligible share of the personal property tax base total as states have increasingly abandoned their efforts to impose property taxes on intangibles.<sup>11</sup>

Real property and tangible and intangible personal property have different characteristics that have led to ever increasing differences in their actual property tax treatment. Fixed and immovable, real property is easier to locate, list and value equitably than is personal property. Accordingly, the burdens of, and resistance to, personal property tax administration and reporting are considerably greater than those that apply to real property.<sup>12</sup>

For example, simple geography will suffice to assure that all real property is listed and taxed. Not so with personal property, and especially intangibles which can be

<sup>8</sup> 2 Bureau of the Census, *supra* note 7, at VII-VIII (Table A and Table B).

<sup>10</sup> The utility assessments combine both real and personal property. *Id.* at XII-XIII.

<sup>11</sup> *Id.* at 135 (Table 14). See also John H. Bowman et al., *Current Patterns and Trends in State and Local Intangibles Taxation*, Nat'l Tax J. (December 1990). Oregon is among the states that do not tax intangibles. An estimated \$65.0 billion in Oregon intangibles went untaxed in 1988. (Stip. ¶ 41, J.A. at 19). See also Oregon Dep't of Revenue, *Oregon's Property Tax System: The Disintegration Continues* 49 (November 1988) (A copy of this report appears as Addendum E to Plaintiffs' Pretrial Reply Brief, filed September 29, 1989 in the district court).

<sup>12</sup> 1 U.S. Advisory Comm. on Intergovernmental Relations, *The Role of the States in Strengthening the Property Tax* 29-32 (1963); Dick Netzer, Brookings Institution, *Economics of the Property Tax* 138-149 (1966).

extremely difficult to locate and list for assessment.<sup>13</sup> Real estate appraisal techniques are well developed and can be applied consistently to all kinds of real property.<sup>14</sup> Personal property is more diverse than real property, and some kinds of personal property are extremely difficult to assess uniformly.<sup>15</sup> Techniques such as sales assessment ratio studies, which are vital to equitable real property tax administration, are not available in the personal property tax arena. *Cf. Clinchfield R.R. Co. v. Lynch*, 700 F.2d 126, 133 (4th Cir. 1983). The difficulties of personal property taxation are such that by 1963, one study concluded, "[o]ne of the conspicuous features of many personal property tax systems is the extent to which they have become legal fictions."<sup>16</sup> Both as a result of political choice to avoid the difficulties inherent in personal property taxation, and as a result of the impact of such difficulties, the portion of the nationwide total property tax base which consists of locally assessed personal property declined from 17.2% in 1956 to just 9.8% in 1986.<sup>17</sup>

A substantial reason for the relative decline in the personal property tax base has been the ever-increasing numbers of states that have enacted a total exemption of tangible personal property or have expanded their lists of partial exemptions. As of 1991, ten states essentially exempted all personal property.<sup>18</sup> There were but four such

<sup>13</sup> 1 U.S. Advisory Comm. on Intergovernmental Relations, *supra* note 12, at 31-32.

<sup>14</sup> See, e.g. Appraisal Institute, *The Appraisal of Real Estate* (10th ed. 1992).

<sup>15</sup> Netzer, *supra* note 12, at 182.

<sup>16</sup> 1 U.S. Advisory Comm. on Intergovernmental Relations, *supra* note 12, at 31.

<sup>17</sup> 2 Bureau of Census, *supra* note 7, at VIII (Table B).

<sup>18</sup> Delaware, Hawaii, Illinois, Iowa, Minnesota, New Hampshire, New York, North Dakota, Pennsylvania and South Dakota. See 1 U.S. Ad-

states in 1977.<sup>19</sup> Many other states have considerably narrowed the personal property tax base in recent decades by exemption of various categories of property. For example, between 1959 and 1984, the number of states taxing business inventories decreased from 46 to 20 and the number of states taxing agricultural personalty decreased from 42 to 25.<sup>20</sup>

By way of contrast, commercial and industrial real property is taxed in every state. Real estate exemptions typically apply to non-profit and governmental owners, but few outright exemptions of business realty apply across the board.<sup>21</sup>

The stipulated situation in Oregon reflects the overall trend in microcosm. An Oregon statute purports to fully tax personal property "in equal and ratable proportion." Or. Rev. Stat. § 307.030. However, Oregon separately classifies personal property,<sup>22</sup> and its actual treatment of personal property is quite different from its treatment of real property. Only \$4.8 billion of business tangible personal property is on Oregon's tax rolls out of a stipulated total value of \$18.9 billion. (Stip. ¶¶ 30, 31, 36, J.A. at 18). The remaining 75% goes untaxed by reason of exemption, underreporting and undervaluation.<sup>23</sup> (Stip. ¶ 37, J.A. at 18-19). In contrast, a stipulated \$24.7 billion of commercial

visory Comm. on Intergovernmental Relations, *Significant Features of Fiscal Federalism* 140 (1992) (Table 43).

<sup>19</sup> 2 Bureau of the Census, U.S. Dep't of Commerce, *1977 Census of Governments* No. 1, at 8 (1978).

<sup>20</sup> Dick Netzer, Urban Research Center of New York University, *Personal Property Taxation in the United States* (1985) (Table 1).

<sup>21</sup> 2 Bureau of the Census, *supra* note 7, at XIX.

<sup>22</sup> Oregon Dep't of Revenue, *supra* note 11, at 42.

<sup>23</sup> A total of \$14.1 billion of business personal property is untaxed. Exemptions account for \$9.7 billion of the untaxed total, with \$1.6 billion the result of underreporting and \$2.8 billion the result of undervaluation. (Stip. ¶¶ 32-36, 43, J.A. at 18-19)

and industrial real property is on the rolls. (Stip. ¶ 46, J.A. at 20).

The factors which are causing a narrowing of the personal property tax base in Oregon and nationwide do not benefit railroads and rail cars. Such properties are typically assessed centrally<sup>24</sup> which system singles out railroads and other utilities for full taxation regardless of the extent of exemption of locally assessed personal property. Thus, absent the intervention of Congress under Section 11503, the nationwide trend of substantial exemption and non-taxation of personal property would not apply to rail property. See *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (railroad personalty was centrally assessed and taxed even though virtually all non-railroad personal property was exempt).

Furthermore, the failure to tax most other non-railroad personalty inexorably increases the tax burden on the rail property and other property that remains subject to tax. Oregon admitted as much in a report describing the disintegration of its property tax system:

Property tax exemptions and preferential assessments are significant because they have a direct bearing on the tax base (total taxable value in a taxing district). A broad tax base eases the burden on the individual taxpayers while a constricted base accentuates the individual taxpayer's burden.

Any exemption or special assessment at less than market value merely shifts the cost of services to the properties which are valued at market. And many of these tax exempt properties also require the services of local government, such as

<sup>24</sup> Bureau of the Census, *supra* note 7, at XII-XIII.



police, fire, streets, etc., which are paid for by the property tax.<sup>25</sup>

Strong forces of political choice, practice and policy in the property tax arena are thus at work in Oregon, and the nation as a whole, tending to cause ever increasing disparities in the property taxation of railroad personalty versus other personalty. The result is correspondingly ever greater and more discriminatory tax burdens on railroads. These differential forces demonstrate the necessity of an analysis in Section 11503 cases which is specifically targeted to this problem.<sup>26</sup>

RPI and ASLRA respectfully submit what common experience makes plain: namely that real and personal property are different and differently taxed. Section 11503 should be construed to respect those differences.

#### B. THE INTENT OF CONGRESS

Legislative history makes it clear that Congress, at the time of enactment of Section 11503, was aware of and approved the universal classification of property into the separate real, tangible personal and intangible categories for tax purposes. This Court previously has found analysis of legislative history to be "inconclusive and irrelevant"<sup>27</sup> on a point where the statutory text of Section 11503 was plain. Nevertheless, legislative history is helpful on the distinction between real and personal property because the

<sup>25</sup> Oregon Dep't of Revenue, *supra* note 11, at 28.

<sup>26</sup> Oregon, together with its state amici demand that they be given wide freedom to fully tax railroads and railroad property notwithstanding Section 11503. However, the arguments of the states ignore their plenary power to put their own tax systems in order by imposing equal taxes on other property. The exercise of that power may not be the political path of least resistance generally favored by the states, but it certainly is an option. The availability of this political option completely defeats any argument that Section 11503 has handcuffed the states.

<sup>27</sup> *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

statutory text itself is inconclusive on this point, while the legislative history is incisive.

The original text of the statute defines the comparison class of commercial and industrial property broadly to include "all property, real or personal."<sup>28</sup> This language suggests that both real and personal property are within the area of congressional concern, but does not explicitly say what comparisons between those classes should be made. The issue is, however, explicitly discussed in a committee report:

[The bill] is not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of real property, tangible personal property, and intangible property, provided that carrier transportation real property is taxed at no higher rate than other real property; that carrier transportation personal property is taxed at no higher rate than other personal property; and, that carrier transportation intangibles are taxed at no higher rate than other intangible property.<sup>29</sup>

As the committee report shows, Congress knew that the states taxed real and personal property differently but it did not consider these classifications to be discriminatory so long as railroads were equally treated within each of the classes. Thus, Congress specifically intended rail personalty to be compared to other personalty and rail realty to be compared to other realty. The courts of appeals have

<sup>28</sup> See Section 306(3)(c). The word "all" and the words "real or personal" were deleted from the subsequent codification into Section 11503(a)(4).

<sup>29</sup> Senate Committee on Commerce, *Discriminatory State Taxation of Interstate Carriers*, S. Rep. No. 1483, 90th Cong., 2d Sess. 10-11 (1968) (commenting on S. 927). See also Senate Committee on Commerce, *Discriminatory State Taxation of Interstate Carriers*, S. Rep. No. 630, 91st Cong., 1st Sess. 11 (1969) (commenting on S. 2289).

recognized this intent and have applied it. *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); *Department of Revenue, State of Fla. v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981). Cf. *Clinchfield R.R. v. Lynch*, 700 F.2d 126 (4th Cir. 1983).

The courts have steadfastly refused to combine the analysis of real property and personal property regardless of which party sought to combine the two categories. *ABF Freight System, Inc. v. Tax Div. of the Ark. Public Service Comm'n.*, 787 F.2d 292 (8th Cir. 1986); *Arkansas-Best Freight System, Inc. v. Lynch*, 723 F.2d 365 (4th Cir. 1983) (cases decided under Motor Carrier Act of 1980, 49 U.S.C. § 11503a, which is modeled after Section 11503.) *ABF Freight* and *Arkansas-Best* challenged the level of assessment of motor carrier property in states where business personal property was assessed at a higher ratio of value than the ratio that applied to business real property. The plaintiff motor carriers were taxed at the personal property ratios, but sought to be equalized to ratios computed on an aggregate, combined basis for all real and personal business property. The Eighth Circuit and Fourth Circuit rejected such claims, emphasizing the statutory language and legislative history of Section 11503 that made it clear that personal property and real property should be considered separately in determining whether discrimination exists.

### C. PRACTICAL EFFECTS

Oregon and its amici complain bitterly of the anticipated negative impact<sup>20</sup> of the Ninth Circuit's ruling on their ability to collect any property tax from rail car companies or railroads. Most of the feared impact arises, however, as a consequence of Oregon's strategic decision to urge a combined comparison upon the Ninth Circuit; an invitation, frankly, that the Ninth Circuit should have declined.

This is a case involving only tangible personal property in the form of rail cars furnished by respondents to railroads. (Stip. ¶¶ 5-22, J.A. at 12-17) The only taxes at issue here are property taxes imposed by Oregon on rail cars. (J.A. at 8-9)

From the outset of this case, respondents sought to demonstrate discrimination solely by comparison to other commercial and industrial *personal* property in Oregon, which was alleged to be 80% untaxed. (J.A. at 8) Oregon ultimately stipulated that 75% of its business personalty was not taxed, but denied that this was discriminatory. Oregon's litigation strategy was to blur the massive extent of untaxed personal property by reference to the comparatively enormous business real property tax base of \$24.7 billion. (Stip. ¶ 46, J.A. at 20) But the strategy went awry for Oregon when the Ninth Circuit accepted Oregon's premise *arguendo*, proceeded to make a combined real and personal comparison, but still found discrimination to exist.

<sup>20</sup> The impact is, in any case, exaggerated and quite minor in comparison to the overall tax base. Nationwide, railroad property accounts for but a part of the 5% of the total property tax base which is centrally assessed. For 1986 the total assessment of railroad property in Oregon is reported by the Census Bureau as \$593 million. 2 Bureau of the Census, *supra* note 7, at 5 (Table 2). This is 0.71% of the total assessed value of all taxed property. Oregon's choice, for example, to leave \$14.1 billion in tangible business personalty untaxed has far more fiscal significance than a complete prohibition of railroad property taxation in Oregon would have.

One of the unanticipated results was a rationale that applied to all railroad property—not just rail cars and other personalty. Oregon's current argument and expressed outrage point out the twin practical defects of the combined analysis that Oregon urges.

On the one hand such analysis tends to obscure otherwise clear discrimination against personal property.<sup>31</sup> This is accomplished analytically by diluting the effects of not taxing personal property by reference to real estate which is taxed. Real estate comprises approximately 62% of the tangible business wealth of the nation.<sup>32</sup> Thus, it will almost always overwhelm tangible personal property in any combined calculation.<sup>33</sup> On the other hand, if discrimination is found, the combined analysis extends the relief to all property.

It does not make sense to exempt all railroad real property simply because most business personalty is not taxed. Similarly, however, the non-taxation of personalty should not be ignored because all realty is taxed. Both results are the absurd, but all too possible, consequence of a combined analysis. If only real-to-real and personal-to-personal comparisons are employed, however, then even a complete exemption of personal property would not impair in the slightest way any State's ability to tax railroad realty.

Separate comparisons by broad categories are precise, logical, and fully consistent with the announced intent of Congress. The combined approach disregards the economic

<sup>31</sup> See *Burlington Northern R.R. Co. v. Bair*, 584 F. Supp. 1229, 1237 (S.D. Iowa 1984).

<sup>32</sup> Allen D. Manvel, *Fiscal Facts & Figures, A Property Tax Update*, Tax Notes 609, 611 (February 3, 1992).

<sup>33</sup> Intangibles, though not the basis of respondents' claims here, could have the same kind of effect but in the opposite direction, since intangibles are not commonly taxed. Oregon does not tax some \$65.0 billion in business and non-business intangibles (Stip. ¶41 J.A. at 19).

reality of property tax structures and leads to absurd results. Cases such as *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981), and *Burlington Northern R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985) make this plain. In those cases, only the discriminatory taxation of the railroad's personal property was enjoined. The states were left free to tax railroad real property assets on the same basis as all other commercial and industrial real property.

## II. THE NINTH CIRCUIT'S FINDING OF DISCRIMINATION WAS CORRECT BUT FOR THE WRONG REASONS

Having argued that the overly-broad examination of Oregon's entire real and tangible personal property tax structure employed by the Ninth Circuit should be rejected by this Court, RPI and ASLRA further submit that (a) the various analytic approaches to determining "discrimination" under Section 11503 offered by Oregon, its amici and the Ninth Circuit are incorrect and (b) the analysis developed and applied by the other courts of appeals should be adopted instead.

Although the discussions and rationales of the cases have varied according to context, the substance of the Section 11503 case law in the lower courts to date has been to require railroads to be taxed only by taxes of general applicability that are also generally applied. Here, this simply means that railcars can be taxed only if the personal property tax is also applied generally to other business property.

The amicus brief of the United States puts it well: "A scheme that taxes railroad property, but exempts all or most non-railroad property within the State falls within the core of 'discrimination' that Subsection (b)(4) proscribes" (U.S. Amicus Brief at 21) (emphasis added). This concept does not purport to set a final, specific and definitive boundary between discriminatory and nondiscrimi-



minatory property taxes, but it is fully sufficient to resolve the case here and should be adopted.

**A. OREGON AND ITS AMICI EACH ARGUE FOR FUNDAMENTALLY FLAWED METHODS OF ANALYSIS FOR DETERMINING THE MEANING OF "DISCRIMINATION" IN THE CONTEXT OF SECTION 11503**

Oregon and its amici offer erroneous methods of analysis for the threshold inquiry of whether "discrimination" exists under Section 11503.

**1. Traditional Commerce Clause Analysis is Inapplicable**

Oregon and several amici argue for application of a mode of analysis akin to the extremely deferential standard employed in discrimination inquiries under the dormant Commerce Clause. *See, e.g., Complete Auto. Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Certainly, absent a federal statute, a state's taxing scheme is accorded vast latitude under the Commerce Clause "before it encounters constitutional restraints." *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 326 (1968). However, where, as here, Congress does exercise its broad authority to regulate interstate commerce the freedom enjoyed by the states in the face of a constitutional challenge to state and local taxes no longer controls. *Wisconsin Dept. of Revenue v. William Wrigley, Jr. Co.*, 112 S. Ct. 2447 (1992); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 86 (1824).

Courts of appeals addressing Section 11503 have appropriately rejected the argument that the analysis of Section 11503 "should be primarily based on constitutional standards. The issue is not a constitutional one, but one of statutory interpretation and application." *Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1574 (11th Cir. 1987). Accordingly, in analyzing the

statutory provision at issue in this case "it is totally irrelevant whether [the] tax is otherwise constitutional. . . ." *Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 407 (9th Cir. 1981) (citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)).

Such a conclusion is reached for the simple reason that "[i]n the realm of interstate commerce, it is one thing to say that a state statute passes constitutional muster in the absence of congressional legislation, and quite another to say that the same state statute may stand in the face of a conflicting law enacted by Congress." *Id.* at 405.

Virtually the same argument as that now made by Oregon regarding the meaning to be given a federal statute's prohibition of discriminatory taxation has already been expressly rejected by this Court in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). In *Snead*, the appellees urged that the applicable statutory provision prohibiting discriminatory taxation of electricity was "no more than a prohibition of a tax that is invalid under the constitutional test of the Commerce Clause." *Id.* at 149. Such an analysis was rejected by this Court, which instead looked to the broader protections expressly enacted by Congress and the specifics of the challenged tax there at issue.

**2. The "Justification" Standard Advocated by Amicus United States is Similarly Infirm**

The United States as Amicus argues, based on the supposed ordinary meaning of the word "discriminate",<sup>34</sup> that discrimination is actionable under Section 11503 "only if

<sup>34</sup> Amicus United States offers the definition of discriminate to be found in the Random House Dictionary. However, if the Court were to adopt instead, for instance, *Webster's New Twentieth Century Dictionary*, a fundamentally different definition would be found ("to make distinctions in treatment; show partiality (in favor of) or prejudice (against)"). *Webster's New Twentieth Century Dictionary Unabridged* 522 (2d ed. 1983). Surely the meaning of Section 11503 does not come down to a choice between lexicographers.

the State cannot justify the differences in treatment." (U.S. Amicus Brief at 8, 17.) To be sure state interests that purport to justify discrimination will always be crucial in an equal protection or similar context as this Court must strike a balance between national constitutional limitations and state prerogatives. However, as shown previously, a constitutional analysis, which would include a "justification" inquiry, was not incorporated into Section 11503.

Congress in enacting Section 11503 has struck the balance between national needs of interstate commerce and state taxing powers. *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 529 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Burlington Northern R.R. Co. v. James*, 911 F.2d 1297, 1300 (8th Cir. 1990); *Union Pacific R.R. Co. v. Department of Revenue of Ore.*, 920 F.2d 581, 585-86 (9th Cir. 1990). Congress has spoken explicitly on this point. Any of the acts against railroads and rail property which are described in Section 11503(b) are declared in the words of the original act "to constitute an *unreasonable* and *unjust* discrimination against, and undue burden on, interstate commerce" (emphasis added).<sup>35</sup> Thus, the Court need not ask whether adverse disparate treatment of railroads for tax purposes is "unjust", i.e., unjustified. Congress itself has declared it is so.

Moreover, Section 11503 contains no explicit basis for a "justification" defense within its language and there is certainly no basis for engrafting a justification defense onto Section 11503 by implication. To the contrary, "the language of § 11503 plainly declares the congressional purpose" behind this legislation. *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must or-

<sup>35</sup> Section 306(1).

dinarily be regarded as conclusive"). See also *Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7, 12 (1983) ("when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute. . .").

"Justification" is simply a variation of the same premise advanced by those who have unsuccessfully attempted to append an "intent" element to Section 11503 discrimination actions, a tactic this Court has resoundingly rejected. *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463, (1987) ("Subsection (b) speaks only in terms of 'acts' which 'unreasonably burden or discriminate against interstate commerce'; nowhere does it refer to the intent of the actor").<sup>36</sup>

The lower courts have taken a narrow view of possible justifications in Section 11503 cases. Although no court has yet found an otherwise discriminatory tax "justified" under Section 11503, courts have recognized the theoretical possibility that differences relating to the intrinsic character of railroads might justify their different treatment. See, e.g., *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 376 (5th Cir. 1987) which states:

It may be that in an appropriate case we would allow the state to save a facially discriminatory tax by showing that it is *necessary* to "compensate" for some state or local tax—a tax applicable to "other commercial and industrial" taxpayers—that for some reason *cannot* be levied against the railroads.

<sup>36</sup> *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) cited by Oregon and the United States is not to the contrary. *Davis* involved an intergovernmental tax immunity statute which was construed to codify existing constitutional standards. *Id.* at 813. Thus, *Davis* actually applied no more than minimum constitutional standards.



See also *Burlington Northern R.R. v. City of Superior, Wis.*, 932 F.2d 1185, 1188 (7th Cir. 1991). Any such justification however, would relate only to peculiar requirements for special treatment of railroads rather than rationales for special benefits to other taxpayers.

Here, any such discussion must be, as it was in *Kansas City Southern*, purely hypothetical because no justification has ever been offered. Certainly, the United States in advancing the justification concept has offered no theoretical, much less record-based, rationale for the massive disparity in Oregon's personal property tax practices. Instead, the United States merely invites this Court to give Oregon a second opportunity to make its case by remanding it for unspecified proceedings. This suggestion ignores the fact that the parties submitted this case on the basis of a comprehensive stipulated record (J.A. at 11-20) which makes no effort to establish justification. This Court is simply not the place to initiate previously unasserted defenses.<sup>37</sup>

Even if a "justification" inquiry were appropriate, Oregon cannot prevail, because any "justification" that could be offered by Oregon's taxing authorities would simply be rationalizations for the political choices being made by that state. The Oregon situation exemplifies the propensity to target rail property as "easy prey" which this Court has identified as the primary vice to be corrected by Section 11503.<sup>38</sup> There is no legitimate justification that requires

<sup>37</sup> The position of the United States in this regard is ironic. The United States originally urged that *certiorari* be granted for this Court to consider and announce a single, unified standard of discrimination in Section 11503 cases so that perceived incipient confusion and inconsistency in the lower courts could be avoided. The call for an *ad hoc* justification analysis in the district courts is certainly at odds with the original views of the United States.

<sup>38</sup> *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)).

or mandates that rail car property be fully valued, assessed, and taxed while the vast majority of a State's personal property goes untaxed. Any such justification would simply serve as a pretext for discrimination.

Ultimately, the question presented to this Court by the decision of the Ninth Circuit is not why massively disparate treatment of rail cars has arisen in Oregon. Neither Oregon's intention nor any *post hoc* justifications can be considered relevant. The only proper issue is whether the extent of disparate treatment shown is enough to establish discrimination.

**B. DISCRIMINATION AGAINST RAIL CAR PERSONAL PROPERTY IS SHOWN, AT THE LEAST, WHEN MOST OTHER BUSINESS PERSONAL PROPERTY WITHIN A STATE GOES UNTAXED**

Much confusion is created in this case from a single, gratuitous overstatement in the Ninth Circuit's opinion concerning the language of Section 11503(b)(4). The Ninth Circuit asserted: "The most natural reading of this language is that the statute is violated by *any* exemption given to other taxpayers but not to railroads." (Pet. App. at 16) (emphasis in original).

Of course, this is not what the statute explicitly says. It is an equally natural—and, RPI and ASLRA would assert, far more realistic—reading of the statute that some level and types of exemption are allowed before discriminatory treatment "results" under Section 11503(b)(4). Common sense, experience, and a desire to avoid absurd results argue persuasively that some exemptions may be granted by a state to a limited portion of its personal property tax base without the necessary conclusion that rail cars are thereby being discriminated against. It is equally clear, however, that discrimination "results" from the full taxation of rail cars if a sufficient quantity of other business personal property is not, in fact, likewise taxed.



As the lone support for its reading of Section 11503(b)(4), the Ninth Circuit's opinion cited to the decision in *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981), and asserted that the Eighth Circuit's decision there held that "any exemption not also available to railroads violates the statute". (Pet. App. at 17). But such was not the holding in *Ogilvie*, which involved the virtually complete exemption of all other business personalty and relief only for railroad personalty. Nor has any other court ever claimed it was, or gone so far as the Ninth Circuit. Moreover, no such quantum jump was, or is now, required in the dispute before this Court because an extremely large percentage of non-railroad personal property is not taxed here.<sup>39</sup>

Issues of discrimination are highly dependent on context and federal courts have traditionally analyzed Section 11053 discrimination issues according to the precise statutory and factual settings in which each case arises. "[I]n the manner of the common law, we must work out the meaning of 49 U.S.C. § 11503 gradually in relation to specific disputes." *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 379 (5th Cir. 1987).

<sup>39</sup> If this Court were to adopt a combined real and personal approach, then the resolution of a number of complex and difficult issues becomes necessary. For example, the consideration of intangibles, which are untaxed in Oregon to the extent of \$65 billion, could mean that no rail property could be taxed in Oregon. *Supra* note 33. Standing timber, which is real property exempt from property tax, and subject to a lower severance tax instead, must be considered, and should be counted as untaxed. The question of a minimum threshold for discrimination, which otherwise need not be reached, becomes a vital issue. Such a threshold, if one exists, must be lower in a combined context if the effects of non-taxation of personalty are not to be lost in the mass of real property. To RPI and ASLRA, these considerations argue forcefully for the relative simplicity of a personal property only analysis. But, if that view is not accepted, the Ninth Circuit's finding of discrimination on combined real and personal property basis should be affirmed.

In the process of resolving the myriad Section 11503(b)(4) disputes which have come before them, the courts have not attempted to set forth a single, universal test of discrimination. They have, however, found with remarkable unanimity<sup>40</sup> that discrimination has been shown in certain circumstances that have repetitively arisen, including the precise situation stipulated to exist in Oregon. Two concepts emerge from the consistent results in the lower courts.

First, railroads and rail property may be taxed only by taxes of general applicability. Taxes imposed only on railroads, or a narrow class which includes railroads, have been consistently found discriminatory. *Burlington Northern R.R. Co. v. City of Superior, Wis.*, 932 F.2d 1185 (7th Cir. 1991); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300 (8th Cir.), cert. denied, 112 S. Ct. 169 (1991); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987); *Alabama Great Southern v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981).

Second, a tax of general applicability must also be generally applied.<sup>41</sup> See, e.g., *Trailer Train Co. v. Leuenberger*,

<sup>40</sup> Literally dozens of judges over the past 15 years within the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have reached strikingly similar conclusions as to the analysis to be employed in Section 11503 litigation in various kinds of cases. Arguments of the tenor employed by Oregon here have been consistently rejected as antithetical to the remedial purposes of Section 11503. As the Fifth Circuit expressed the point, "[t]he shadows have lengthened across their arguments, as one-by-one every Court of Appeals that has considered the issue has sided with the railroads' position. Although these decisions do not bind us, we do not lightly disregard such unanimity . . . ." *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 374 (5th Cir. 1987).

<sup>41</sup> Cf. Section 306(1)(c) of the original Act which requires rail property to be taxed at a rate no higher than the "generally applicable" commercial and industrial rate. The "generally applicable" rate has been found to be the rate applicable to the majority of business property.

885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).<sup>42</sup>

The rationale of these cases is consistent with this Court's decisions. "The only simple way to prevent tax discrimination against the railroads is to tie their fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden." *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). Compare *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131-32 (1987). As this Court has observed: "[w]hen the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome

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*Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983).

<sup>42</sup> All of these cases were concerned only with claims of discriminatory exemption practices. The claims of respondents here are slightly broader because, in addition to exemption, underreporting and undervaluation of tangible personal property are each separately stipulated to have resulted in non-taxation of substantial portions of the personal property tax base. This Court need not decide here whether underreporting and undervaluation may properly be considered because the extent of exemptions alone is plainly more than sufficient to warrant relief and the parties are not arguing the issue. Nevertheless, RPI and ASLRA urge that this Court not limit the possible basis of claims to exemptions only. Section 11503(b)(4) is concerned, in the words of the original Act, at Section 306(1)(d), with discriminatory "results". Exemptions are just one of the ways that non-taxation of other property may occur. Undervaluation and underreporting have exactly the same impact and should be considered indistinguishable from exemption in determining whether a tax "results in discriminatory treatment". For comparison purposes the important issue is whether the other property is taxed or not taxed. The reason why it is not taxed is completely irrelevant.

taxation if it must impose the same burden on the rest of its constituency." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). See also *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring).

The ultimate line at which taxes are found to be discriminatory because not generally applicable or generally applied has not been precisely drawn by the case law because the facts presented by the cases decided to date have involved only the massive extent of exemption of the kind presented here.

All of the decided cases on exemptions, including this one have involved claims well within the "core" of discrimination as defined in the Brief of the United States, that is, when "most" other personal property is not taxed. Thus, the boundary of discrimination at the periphery has remained undefined in all previous cases. True, the Ninth Circuit ventured to the edge in its opinion, but quite unnecessarily so because Oregon has admitted by stipulation that 67% of all commercial and industrial tangible personal property in Oregon is exempt. (Stip. ¶¶ 30-36, J.A. at 18.) The Oregon personal property tax is not generally applicable under any possible view of that concept.

To be sure, rail car owners find themselves in the company of the owners of 25% of the personal property that is also taxed by Oregon's taxing authorities. But "[d]iscrimination against a taxpayer protected by § [11503(b)] cannot be justified because others are also victims of discrimination." *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 418 (8th Cir. 1988). See also *Ogilvie*, 492 F. Supp. 446, 455 (N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) ("discrimination against one business or person cannot be justified merely because others are also the victims of discrimination").

Where, as here, the pattern and practice of a state is to allow most personal property to go untaxed, while rail

cars remain a disfavored minority that is fully taxed, the system is discriminatory on its face. Congress wrote Section 11503(b)(4) broadly and, contrary to various arguments of Oregon's and its Amici, no advisory opinion attempting to offer some "definitive" definition of "discrimination" is required to resolve this case. Rather, the facts warrant the following holding consistent with the uniform case law already developed by the courts below: The full taxation of rail cars by a state is discriminatory, within the meaning of Section 11503, at least when most other commercial and industrial tangible personal property in that state goes untaxed. No more is presented here and no more needs to be decided.

### CONCLUSION

RPI and ASLRA urge this Court to affirm the result of the court of appeals by holding that the proper comparison class with respect to property taxation of rail cars is other business tangible personal property and that discrimination is shown, at the least, when rail cars are fully taxed but most other business tangible personal property within a state is not taxed.

Respectfully submitted,

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*The Railway Progress Institute and*

*The American Short Line Railroad*

*Association*



## APPENDIX

**APPENDIX A****MEMBERS OF THE RAILWAY PROGRESS INSTITUTE**

ABB Traction Inc.  
ABC Rail Corporation  
ACF Industries, Inc.  
AEG Transportation Systems, Inc.  
Allied International Corp.  
AMCI  
AMSTED Industries Incorporated  
Atchison Casting Corp.  
Bombardier Corporation  
Raul V. Bravo & Associates  
Brenco, Inc.  
Buckeye Steel Castings Company  
Buffalo Brake Beam Company  
CANAC International Inc.  
Chicago Freight Car Leasing Company  
Cleveland Track Material, Inc.  
Difco, Inc.  
Digital Concepts, Inc.  
Electro-Motive Division, General Motors Corporation  
Ellcon-National, Inc.  
Fairmont Tamper, a Harsco Company  
FM Industries, Inc.  
Fruit Growers Express Company  
GEC Alsthom Transportation, Inc.  
General American Transportation Corporation  
GE Capital Railcar Services Corporation  
GE Transportation Systems  
General Railway Signal Corp.  
GLNX Corporation  
The Goodyear Tire & Rubber Company Engineered Products Division  
The Greenbrier Companies  
The Gregg Company, Ltd.  
Hackney-Wellington & Associates, Inc.  
Harmon Industries, Inc.

Henkels & McCoy, Inc.  
 IEC-Holden, Inc.  
 IIT Research Institute (IITRI)  
 Johnstown America Corporation, Freight Car Division  
 K-III Directory Corporation  
 Keystone Railway Equipment Co.  
 Kraiburg Corporation of America  
 Lincoln Industries Corporation  
 LTK Engineering Services  
 McConway & Torley Corporation  
 Mercer Management Consulting, Inc.  
 Henry Miller Spring & Manufacturing Company  
 Miner Enterprises, Inc.  
 Morrison Knudsen Corp.  
 Morton Manufacturing Company  
 NACO, Incorporated National Castings Division  
 New York Air Brake, A Unit of Knorr Brake  
 Nordco  
 The Okonite Company  
 ORGO-Thermit, Inc.  
 Pandrol North America Pandrol Jackson, Inc.  
 Pennsy Corporation  
 Pennsylvania Steel Technologies, Inc., A Subsidiary of  
 Bethlehem Steel Corporation  
 Pittsburgh Spring, Inc.  
 Plasser American Corporation  
 PLM International, Inc.  
 The Polymer Corporation  
 Potomac Railway Supply Company  
 Progressive Railroading  
 Pulse Electronics, Inc.  
 Rail Bearing Service, Inc.  
 Rail Transportation Systems, Inc.  
 Railway Age  
 RAILX, Division of Southern Machine & Tool Company  
 Riedel OMNI Rubber Products, Inc.  
 Rockwell International

Roller Bearing Industries, Inc.  
 Safetran Systems Corporation  
 Schaefer Equipment, Inc.  
 Tom Schofield & Associates, Inc.  
 Norman W. Seip & Associates  
 SERRMI, Inc.  
 Servo Corporation of America  
 Standard Car Truck Company  
 Standard Steel  
 A. Stucki Company  
 D.A. Summers & Associates, Inc.  
 Temco Corporation  
 Thrall Car Manufacturing Company  
 The Timken Company  
 Trackmobile, Inc.  
 Transamerica Leasing Inc.  
 Transco Railway Products, Inc.  
 TRIAX  
 Trinity Industries  
 TTX Company  
 Union Switch & Signal Inc.  
 Union Tank Car Company  
 Unit Rail Anchor Company  
 United Industries Corporation  
 Unity Railway Supply Co., Inc.  
 Vapor-Mark IV Transportation Products Group  
 V-H Corporation  
 Vulcan Materials Company  
 Western-Cullen-Hayes, Inc.  
 Westinghouse Air Brake Company/Cardwell-Westinghouse  
 YSD Industries, Inc.



## APPENDIX B

THE AMERICAN SHORT LINE RAILROAD  
ASSOCIATION

## RAIL MEMBERS

Abbeville & Grimes Railway Company  
 Aberdeen, Carolina & Western Railway Co.  
 Aberdeen & Rockfish Railroad Company  
 Acadiana Railway Company  
 Adrian & Blissfield Rail Road Company  
 Akron & Barberton Belt Railroad Company  
 Alabama Railroad  
 Alabama & Florida Railway Co.  
 Alexander Railroad Company  
 Algers, Winslow & Western Railway Company  
 Aliquippa and Southern Railroad Company  
 Allegheny Railroad Company  
 Amador Central Railroad  
 Angelina & Neches River Railroad Company  
 Ann Arbor Railroad  
 Apache Railway Company  
 Apalachicola Northern Railroad Company  
 Appanoose County Community Railroad  
 Arcade & Attica Railroad Corporation  
 Arizona & California Railroad  
 Arizona Central Rail Road  
 Arizona Eastern Railway Company  
 Arkansas, Louisiana & Mississippi Railway Co.  
 Arkansas & Missouri Railroad Company  
 Arkansas Midland Railroad Company, Inc.  
 Aroostook Valley Railroad Company  
 Ashland Railway Company  
 Ashley, Drew & Northern Railway Company  
 AT&L Railroad Company  
 Atlanta & St. Andrews Bay Railway Company  
 Atlantic and Gulf Railroad Company  
 Atlantic and Western Railway, L.P.

Austin & Northwestern Railroad Company

Baltimore & Annapolis Railroad Company  
 Bath & Hammondsport Railway Company  
 Bauxite & Northern Railway Company  
 Bay Colony Railroad Corporation  
 Beech Mountain Railroad Company  
 Belfast & Moosehead Lake Railroad Company  
 The Belt Parkway Co. of Chicago  
 Birmingham Southern Railroad Company  
 Black River & Western Corporation  
 Bloomer Line, The  
 Blue Mountain & Reading Railroad Company  
 Border Pacific Railroad Company  
 Brandywine Valley Railroad Company  
 Bristol Industrial Terminal Railway, Inc.  
 Brownsville & Rio Grande International Railroad  
 Buckingham Branch Railroad Company  
 Buffalo & Pittsburgh Railroad, Inc.  
 Buffalo Southern Railroad  
 Burlington Junction Railway

C & S Railroad Corporation  
 Cairo Terminal Railroad  
 California Western Railroad  
 Cambria and Indiana Railroad Company  
 Caney Fork & Western Railroad  
 Canton Railroad Company  
 Carolina Coastal Railway, Inc.  
 Carolina & Northwestern Railroad  
 Carolina Piedmont Division/SC Central Railroad  
 Carolina Rail Services Company  
 Cedar Rapids & Iowa City Railway Company  
 Cedar River Railroad Company  
 Central California Traction Co.  
 Central Indiana & Western Railroad  
 Central Kansas Railway  
 Central Michigan Railway Company

Central Montana Rail  
 Central Railroad Company of Indianapolis, Inc.  
 Central of Tennessee Railway & Navigation Co.  
 Central Vermont Railway, Inc.  
 Champagne Railroad, Inc.  
 Chaparral Railroad Company, Inc.  
 Chattahoochee Industrial Railroad  
 Cheney Railroad Company  
 Chesapeake & Albemarle Railroad  
 Chestnut Ridge Railway Company  
 Chicago, Central & Pacific Railroad Company  
 Chicago and Illinois Midland Railway Co.  
 Chicago Rail Link  
 Chicago Short Line Railway Company  
 Chicago, SouthShore & South Bend Railway  
 City of Prineville Railway  
 Claremont-Concord Railroad Corporation  
 Clarendon & Pittsford Railroad Company  
 Colonel's Island Railroad  
 Colorado & Wyoming Railway Company  
 Columbia & Cowlitz Railway Company  
 Columbia Terminal  
 Columbus & Greenville Railway Company  
 Commonwealth Railway Incorporated  
 Conemaugh & Black Lick Railroad Company  
 Connecticut Central Railroad  
 Copper Basin Railway, Inc.  
 Crab Orchard & Egyptian Railroad  
 Cumbres & Toltec Scenic Railroad  
 Cuyahoga Valley Railway Company  
  
 Dakota, Minnesota & Eastern Railroad  
 Dakota, Missouri Valley & Western Railroad, Inc.  
 Dakota Rail, Inc.  
 Dallas, Garland & Northeastern Railroad  
 Dansville & Mount Morris Railroad Company  
 Dardanelle & Russellville Railroad

Delaware Coast Line Railroad Company  
 Delray Connecting Railroad Company  
 Delta Valley & Southern Railway Company  
 Depew, Lancaster & Western Railroad Company, Inc.  
 DeQueen & Eastern Railroad Company  
 Duluth & Northeastern Railroad Company  
 Dunn-Erwin Railway Corporation  
  
 East Camden & Highland Railroad Company  
 East Cooper and Berkeley Railroad  
 East Erie Commercial Railroad  
 East Jersey Railroad & Terminal Company  
 East Portland Traction Company  
 East Tennessee Railway, L.P.  
 Eastern Alabama Railway  
 Eastern Shore Railroad, Inc.  
 Escanaba & Lake Superior Railroad  
 Everett Railroad Company, The  
  
 Farmrail Corporation  
 Florida Central Railroad Company  
 Florida Midland Railroad Co., Inc.  
 Florida Northern Railroad Company  
 Florida West Coast Railroad Company  
 Floydada & Plainview Railroad  
 Fordyce & Princeton Railroad  
 Fort Smith Railroad Company  
 Fort Worth & Western Railroad  
 Fox River Valley Railroad Corporation  
  
 Galveston Railroad, L.P.  
 Garden City Western Railway Company  
 Gateway Western Railway  
 Genesee & Wyoming Railroad Company  
 Georgetown Railroad Company  
 Georgia & Alabama Division/SC Central Railroad  
 Georgia Central Railway, L.P.

Georgia Great Southern Division  
 Georgia Northeastern Railroad Co., Inc.  
 Georgia Southwestern Division/SC Central Railroad  
 Gettysburg Railroad Company  
 Gloster Southern Railroad Company  
 Golden Triangle Railroad  
 Grafton & Upton Railroad Company  
 Grand Canyon Railway, Inc.  
 Grainbelt Corporation  
 Great River Railroad  
 Great Walton Railroad Company, Inc.  
 Great Western Railway Company  
 Green Bay & Western Railroad Company  
 Green Mountain Railroad Company  
 Greenville & Northern Railway Company  
 Gulf, Colorado & San Saba Railway

H & S Railroad Company  
 Hampton & Branchville Railroad Company  
 Harbor Belt Line Railroad  
 Hartwell Railroad Company  
 Hollis & Eastern Railroad Company  
 Housatonic Railroad Company  
 Houston Belt & Terminal Railway Company  
 Huntsville Madison County RR Authority, The  
 Huron and Eastern Railway Company, Inc.  
 Hutchinson & Northern Railway Company

Indian Creek Railroad Company  
 Indiana Harbor Belt Railroad Company  
 Indiana Hi-Rail Corporation  
 Indiana Northeastern Railroad Company, Inc.  
 Indiana & Ohio Central Railroad, Inc.  
 Indiana & Ohio Eastern Railroad, Inc.  
 Indiana and Ohio Railroad Company  
 Indiana & Ohio Railway Company  
 Indiana Southern Railroad, Inc.

Indiana Rail Road Company, The  
 Iowa Interstate Railroad Ltd.  
 Iowa Traction Railroad Company  
 ISS Rail, Inc.

J K Line, Inc.  
 Jaxport Terminal Railway Company  
 Jefferson Warrior Railroad Company  
 Joppa & Eastern Railroad Company

Kalamazoo, Lake Shore & Chicago Railway  
 Kankakee, Beaverville & Southern Railroad  
 Kansas City Public Service Freight Operation  
 Kansas Southwestern Railway  
 Kentucky & Tennessee Railway  
 Keokuk Junction Railway  
 Kiamichi Railroad Company, Inc.  
 Knox & Kane Railroad Company  
 KWT Railway, Inc.  
 Kyle Railroad Company

Lackawanna Valley Railroad  
 Lahaina Kaanapali & Pacific Rail Road  
 Lake State Railway Company  
 Lake Superior & Ishpeming Railroad Company  
 Lake Terminal Railroad Company, The  
 Lamoille Valley Railroad Company, Inc.  
 Lancaster & Chester Railway Company  
 Landisville Railroad, Inc.  
 Laurinburg & Southern Railroad  
 Lewis & Clark Railway  
 Little Kanawha River Rail, Inc.  
 Little Rock Port Railroad  
 Little Rock & Western Railway, L.P.  
 Livonia, Avon & Lakeville Railroad Corporation  
 Logansport & Eel River Short-Line Co., Inc.  
 Long Island Rail Road  
 Longview, Portland & Northern Railway Company



Louisiana & Delta Railroad Co., Inc.  
 Louisiana & North West Railroad Company  
 Louisville, New Albany & Corydon Railroad Company  
  
 Madison Railroad (City of Madison Port Auth.)  
 Mahoning Valley Railway Company  
 Maine Coast Railroad  
 Manufacturers Railway Company  
 Maryland Midland Railway Company  
 Maryland & Pennsylvania Railroad  
 Massachusetts Central Railroad Corporation  
 Massena Terminal Railroad Company, The  
 McCloud Railway Company  
 Meridian & Bigbee Railroad Company  
 M. G. Rail, Inc.  
 Michigan Shore Railroad, Inc.  
 Michigan Southern Railroad  
 Mid Atlantic Railroad Company, Inc.  
 Middletown & Hummelstown Railroad Company  
 Middletown & New Jersey Ry. Co., Inc.  
 Midland Terminal Company  
 Mid-Michigan Railroad  
 Midwest Coal Handling Co., Inc.  
 Minnesota Commercial Railroad Company  
 Minnesota, Dakota & Western Railway Company  
 Mississippi Central Railroad  
 Mississippi Delta Railroad  
 Mississippi Export Railroad Company  
 Mississippi & Skuna Valley Railroad Company  
 Mississippian Railway Cooperative, Inc.  
 Missouri Southeastern Railroad  
 MNVA Railroad, Inc.  
 Modesto & Empire Traction Company  
 Mohawk, Adirondack & Northern Railroad Corporation  
 Monongahela Connecting Railroad Company  
 Montana Rail Link, Inc.  
 Montana Western Railway Company

Morristown & Erie Railway, Inc.  
 Moscow, Camden & San Augustine Railroad  
  
 Napa Valley Railroad Company  
 Nash County Railroad Corporation  
 New Georgia Railroad  
 New Hampshire North Coast Corporation  
 New Hampshire and Vermont Railway  
 New Orleans Lower Coast Railroad  
 New York Cross Harbor Railroad Terminal Co.  
 New York & Greenwood Lake Railway  
 New York & Lake Erie Railroad Company  
 New York, Susquehanna & Western Railroad  
 Newburgh & South Shore Railroad Company  
 Nimishillen & Tuscarawas Railway Company  
 Nittany & Bald Eagle Railroad Company  
 Norfolk and Portsmouth Belt Line  
 North Carolina & Virginia Railroad Co., Inc.  
 North Coast Railroad  
 North Shore Railroad Company  
 Northeast Kansas & Missouri Railroad  
 Northern Nevada Railroad Corporation  
 Northwestern Oklahoma Railroad Company  
  
 Octoraro Railway, Inc.  
 Ogeechee Railway Company  
 Ohio Central Railroad, Inc.  
 Ohio Southern Railroad, Inc.  
 Oil Creek & Titusville Lines  
 Old Augusta Railroad Co.  
 Omaha, Lincoln and Beatrice Railway Company  
 Ontario Central Railroad Corporation  
 Ontario Midland Railroad Corporation  
 Oregon, Pacific & Eastern Railroad Company  
 Otter Tail Valley Railroad  
 Ouachita Railroad Company

Paducah and Louisville Railway, Inc.  
 Parr Terminal Railroad  
 Patapsco & Back Rivers Railroad  
 Pearl River Valley Railroad  
 Pecos Valley Southern Railway Company  
 Pee Dee River Railway  
 Pend Oreille Valley Railroad  
 Philadelphia, Bethlehem and New England Railroad  
 Pickens Railroad Company  
 Pigeon River Railroad Company  
 Pioneer Valley Railroad Company, Inc.  
 Pittsburg and Shawmut Railroad Company  
 Pittsburgh, Allegheny & McKees Rocks Railroad  
 Pittsburgh and Ohio Valley Railroad Company  
 Point Comfort & Northern Railway Company  
 Port Bienville Railroad  
 Port Jersey Railroad Company  
 Port Royal Railroad  
 Port Terminal RR of South Carolina  
 Port of Tillamook Bay Railroad  
 Port Utilities Commission of Charleston, The  
 Prescott & Northwestern Railroad Company  
 Providence and Worcester Railroad Company

Quincy Bay Terminal Company

Railroad Switching Service of Missouri, Inc.  
 Rarus Railway, Inc.  
 Red River Valley & Western Railroad Co.  
 Red Springs and Northern Railroad Company  
 River Terminal Railway Company  
 R. J. Corman Railroad Company/Cleveland Line  
 RJ Corman Railroad Company/The Memphis Line  
 R. J. Corman Railroad Corporation  
 Rochester & Southern Railroad Co.  
 Rockdale, Sandow & Southern Railroad Company

Sabine River & Northern Railroad Company

Sacramento Southern Railroad, California State Railroad  
 Museum  
 Salt Branch Historic Railroad, Inc.  
 Salt Lake, Garfield & Western Railway  
 Sand Springs Railway Company  
 Sandersville Railroad Company  
 San Diego & Imperial Valley Railroad Company  
 San Joaquin Valley Railroad Co., Inc.  
 San Luis Central Railroad  
 San Manuel Arizona Railroad Company  
 Santa Cruz, Big Trees & Pacific Railway Co.  
 Santa Fe Southern Railway, Inc.  
 Santa Maria Valley Railroad Company  
 Seagraves, Whiteface & Lubbock Railroad  
 Seminole Gulf Railway L.P.  
 Shamokin Valley Railroad Company  
 Sierra Railroad Company  
 South Branch Valley Railroad  
 South Buffalo Railway Company  
 South Carolina Central Railroad Co., Inc.  
 South Central Florida Railroad  
 South Central Tennessee Railroad  
 South Orient Railroad Company, Ltd.  
 Southern Railroad Company of New Jersey  
 Southern San Luis Valley Railroad Company  
 St. Lawrence & Atlantic Railroad Company  
 St. Lawrence & Raquette River Railroad  
 St. Maries River Railroad Company  
 St. Marys Railroad Company  
 Steelton & Highspire Railroad Company  
 Stewartstown Railroad Company  
 Stockton Terminal & Eastern Railroad  
 Stourbridge Railroad Company

Tacoma Municipal Belt Line Railway  
 Tennessee Southern Railroad Company, Inc.  
 Tennken Railroad Company

Terminal Railway - Alabama State Docks  
 Texas Central Railroad Company  
 Texas, Gonzales & Northern Railway Company  
 Texas Mexican Railway Company, The  
 Texas & New Mexico Railroad  
 Texas North Western Railway Company  
 Texas Northeastern Railroad  
 Texas & Northern Railway Company  
 Texas, Oklahoma and Eastern Railroad Company  
 Texas South-Eastern Railroad Company  
 Thermal Belt Railway  
 Tomahawk Railway, L.P.  
 Tradewater Railway Company  
 Transkentucky Transportation Railroad, Inc.  
 Trona Railway Company  
 Tulsa-Sapulpa Union Railway Company  
 Turtle Creek Industrial Railroad, Inc.  
 Tuscola & Saginaw Bay Railway  
 Twin Cities & Western Railroad Company

Union Railroad Company  
 Upper Merion & Plymouth Railroad Company  
 Utah Central Railway  
 Utah Railway Company

Valdosta Railway, L.P.  
 Vandelia Railroad Company  
 Ventura County Railway Company  
 Vermont Railway, Inc.  
 Virginia Southern Division/North Carolina & Virginia RR

Wabash & Grand River Railway  
 Walking Horse & Eastern Railroad  
 Warren & Saline River Railroad  
 Washington Central Railroad Co., Inc.  
 Washington County Railroad Corporation  
 WCTU Railway Company

West Jersey Railroad Company  
 West Tennessee Railroad  
 Western Rail Road Company  
 Wheeling and Lake Erie Railway Company  
 Wichita, Tillman & Jackson Railway  
 Willamette & Pacific Railroad, Inc.  
 Willamette Valley Railway Co.  
 Wilmington Terminal Railroad, L.P.  
 Wilmington & Western Railway Company  
 Winchester & Western Railroad Company  
 Wiregrass Central Railroad  
 Wisconsin & Calumet Railroad Company  
 Wisconsin Central Ltd.  
 Wisconsin & Michigan Railway Company  
 Wisconsin & Southern Railroad Company

Yadkin Valley Railroad  
 Yorkrail, Inc.  
 Youngstown & Austintown Railroad  
 Yreka Western Railroad Company

#### OTHER MEMBERS

Atlantic Track & Turnout  
 Automated Monitoring & Control International, Inc.  
 Automated Transportation Support Systems  
 Azcon Corporation

Bankers Insurance Company  
 R. L. Banks & Associates  
 Berwick Freight Car Company  
 Birmingham Rail & Locomotive Company, Inc.  
 Boatright Enterprises, Inc.  
 Brandt Construction Company/Track Division  
 BRESCO, Inc.  
 W. M. Brode Company  
 Brown Rail Road Equipment, Inc.  
 Burke-Parsons-Bowlby Corporation, The



Burlington Northern Rail Services, Inc.

C & H Chemical, Inc.

California Union Insurance Company

Canac International, Inc.

Canton Agency, Inc.

Carter & Burgess, Inc.

Caterpillar, Inc.

CCTC International

Century Precast

Chemetron Railway Products/True Temper

Chicago Freight Car Leasing Company

Chromium Corporation

C. K. Industries, Inc.

Clark Industries, Inc.

Commercial Metals Railroad Salvage Company

Conley Frog and Switch Company

Continental Excess & Select

Cooper Enterprises, Inc.

Corbin Railway Service Company

Daniel, Mann, Johnson & Mendenhall

Dataquest, Inc.

Diesel Supply Company, Inc.

DIFCO, Inc.

Diversified Tracks, Inc.

DJR, Inc./Railroad Signal Contractors

Dupont Company

Durox Company

Thomas K. Dyer, Inc.

Eastern Electric Apparatus Repair Company, Inc.

Economy Electric Company

Eide Helmeke & Company

ENSCO, Inc.

Epton Industries, Inc.

Esco Equipment Service Company

Fairmont-Tamper

Fastrac Railroad Construction

First National Bank of Boston

FM Industries, Inc.

L. B. Foster Company

Frederick Agency, The

Freight Services, Inc.

FSA Rebuilding

GATX Capital Corporation

G. E. CAPITAL Railcar Services, Inc.

G. E./Service & Apparatus Division

G. E./Transportation Systems Business Operation

General Motors Locomotive Group

General Railway Signal Corporation

GNB Incorporated/TPS Company, Inc.

Goderich-Exeter Railway Co.

Gohmann and Associates, Inc.

Goodyear Tire & Rubber Company

Gordon, Bua & Read, Inc.

Greater Shenandoah Development Company

Greenbrier Companies, The

Harmon Industries

Frederic R. Harris, Inc.

Haynes Corporation

Helm Financial Corporation

Herzog Contracting Corporation

Hi-Rail Corporation

Donald J. Hogan & Company

Hoke & Associates, Inc.

Holland Company

Homestead Insurance Co.

Hulcher Services

IIT Research Institute

Illinois Auto Electric Company

Independent Equipment Company  
Industrial Track Supply Company

Jacobson, Goldfarb & Scott, Inc.  
JMA Railroad Supply Company  
T. C. Johnson Company  
David J. Joseph Company

Kerr-McGee Chemical Corporation  
Keystone Railway Equipment Company  
Klutts Equipment, Inc.  
Koppers Industries, Inc.

L & M Radiator, Inc.  
L & W Industries, Incorporated  
Lakeside Fusee Corporation  
Lewis Rail Service Company  
Lincoln Industries, Inc.  
Lincoln Insurance  
Logan Corporation

Macdonald & Company  
McConway & Torley Corporation  
H. P. McGinley, Inc.  
Merchants Despatch Transportation Corporation  
Mid America Railway Supply, Inc.  
Midwest Steel  
Modern Track Machinery, Inc.  
Morrison-Knudsen Corporation  
Morrison Metalweld Process/DTS Corporation  
Motor Coils Manufacturing Company  
Multi-Service Supply Division

National Electric Gate Company  
National Railway Equipment Company  
NationsBank of Tennessee  
New York Air Brake Company

Nolan Company, The  
Nordco, Inc.  
NorRail, Inc.  
North American Railway Services, Inc.  
Northbrook Rail Corporation

Osmose Railroad Division  
Orgo-Thermit, Inc.

Pacific Mutual Services  
Pacific Rail Leasing Corporation  
Palmer & Cay/Carswell, Inc.  
Pandrol Jackson, Inc.  
Parsons Brinckerhoff  
Pasquale and Bowers, C.P.A.'s  
Patco Industries, Inc.  
Peaker Services, Inc.  
Plasser American Corporation  
Pohl Corporation  
Portec, Inc.  
Power Parts Company  
Power Parts Sign Company  
Professional Railroad Placement Services, Inc.  
Professional Railroad Services Company  
Provident Life and Accident Insurance Co.  
Pulse Electronics, Inc.

Quality Bearing Service, Inc.  
Quality Transportation Service  
Queen City, Incorporated

Racine Railroad Products, Inc.  
Rail Link, Inc.  
Rail Systems, Inc.  
Railcar Management, Inc.  
Railcar Specialties, Inc.  
RAILINC Corporation

Railroad Friction Products Corporation  
 Railroad Service, Inc.  
 RailSafe, Inc.  
 RailTex, Inc.  
 Railway Claim Services, Inc.  
 Railway Educational Bureau, The  
 Railway & Industrial Services, Inc.  
 Railway Services, Inc.  
 RailX  
 RCC Materials & Equipment Corporation  
 Recoveries Unlimited, Inc.  
 Recovery and Reclamation, Inc.  
 Red Rock Consulting, Inc.  
 Relco Locomotives, Inc.  
 Reliance Insurance Company  
 Republic Locomotive Works  
 Riedel Omni Products, Inc.  
 Rollins Hudig Hall  
  
 S & C Distribution Company  
 Safetran Systems Corporation  
 Safety Kleen/Breslube U.S.A.  
 SAFT Nife, Inc.  
 Sardello, Inc.  
 Seaman Timber Company, Inc.  
 Seneca Railroad & Mining, Inc.  
 Shortline Railroad Insurance Brokers  
 Silcott Railway Equipment  
 Stanley H. Smith & Company, Inc.  
 Smyth, Sanford & Gerard, Inc.  
 Southern Indiana Wood Preserving Co., Inc.  
 Sperry Rail Service  
 Spike Industries  
 SSI Mobley Company, Inc.  
 Standard Car Truck Company  
 Station List Publishing Company  
 Steel Processing Services, Inc.

R.W. Summers Railroad Contractor, Inc.  
 Superior Tie & Timber  
 B. Sykes Limited  
  
 Temco, Inc./Railway Products Division  
 Theimeg, Inc.  
 Thompson Industries, Inc.  
 Thrall Car Manufacturing Company  
 Touchstone, Inc.  
 Touchton Air Brake Company, Inc.  
 Tracks Unlimited, Inc.  
 Train Track Computer Systems, Inc.  
 Transmetrics, Inc.  
 Transportation Marketing Services  
 Transportation Training Services  
 Triad Contractors, Inc.  
 Triangle Engineered Products, Inc.  
 Trinity Industries, Inc. - Parts Division  
  
 Union Switch & Signal, Inc.  
 Unit Rail Anchor Company  
 United Shortline, Inc.  
  
 VMV Enterprises, Inc.  
 Vulcan Materials Company  
  
 Webster Wood Preserving Co.  
 Western-Cullen-Hayes, Inc.  
 Western Plant Services, Inc.  
 Western States Supply Company, Inc.  
 Westinghouse Air Brake Company  
 Wheeling Technologies, Inc.  
 Wilson & Company  
 WWIB Transportation Services  
  
 XTRA, Inc.  
  
 Yankeetown Dock Corporation  
 Yuasa-Exide, Inc.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
RICHARD A. MUNN, in his Capacity as Director of the  
Department of Revenue of the State of Oregon,  
v. *Petitioner,*

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPOR-  
TATION CORPORATION; GENERAL ELECTRIC RAILCAR  
SERVICES CORPORATION; PULLMAN LEASING COMPANY;  
RAILBOX COMPANY; RAILGON COMPANY; TRAILER  
TRAIN COMPANY; UNION TANK CAR COMPANY,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR THE ASSOCIATION OF  
AMERICAN RAILROADS AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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Dated: September 2, 1993

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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DEPARTMENT OF REVENUE OF THE STATE OF OREGON,  
RICHARD A. MUNN, in his Capacity as Director of the  
Department of Revenue of the State of Oregon,

v. *Petitioner,*

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPOR-  
TATION CORPORATION; GENERAL ELECTRIC RAILCAR  
SERVICES CORPORATION; PULLMAN LEASING COMPANY;  
RAILBOX COMPANY; RAILGON COMPANY; TRAILER  
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**BRIEF FOR THE ASSOCIATION OF  
AMERICAN RAILROADS AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENTS**

\_\_\_\_\_  
**INTEREST OF *AMICUS CURIAE***

The Association of American Railroads (“AAR”) is a voluntary, not-for-profit incorporated trade association of the Nation’s railroads.<sup>1</sup> AAR’s members operate approximately 76% of the line haul mileage, employ approxi-

<sup>1</sup> Petitioner and respondents have consented to the filing of this brief. The parties’ consent letters have been filed with the Clerk.

mately 90% of the workers, and produce approximately 91% of the freight revenues of all railroads in the United States. Each of AAR's members is an interstate carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. On matters of common concern, AAR represents its members before courts, agencies, and the Congress.

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), 49 U.S.C. § 11503 (1988) (hereinafter "Section 11503"), which prohibits state tax discrimination against railroads. AAR was one of the leading proponents of Section 11503. AAR and others presented voluminous evidence over a 15-year period, from which Congress concluded that tax discrimination against railroads was pervasive and imposed substantial burdens on interstate commerce.

As a representative of the railroads that Section 11503 was designed to protect, AAR maintains an acute interest in its interpretation and application. AAR participates as an *amicus curiae* in cases that threaten to restrict the application of the statute as Congress enacted it. AAR filed an *amicus* brief in *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), the only Section 11503 case that this Court has previously heard. AAR appeared in the courts below as an *amicus curiae*. Because the interpretation of Section 11503 to respondent carlines in this case will apply to railroads as well, AAR's members have a strong interest in the proper resolution of this case.

The Nation's railroads also have a compelling financial interest in the taxation of the respondent carlines. The carlines furnish railroad cars either directly to the railroads, or to rail shippers for subsequent use by the railroads. The relationships between the railroads and the carlines ensure that the economic burden of discrim-

inatory state taxation of carlines is ultimately borne by the railroads and their customers.

"The use of private cars on the railroads dates from the very beginning of transportation by rail." 2 I. L. Sharfman, *The Interstate Commerce Commission* 120 (1931) ("Sharfman"). As rail transportation developed in the nineteenth century, railroads often were unable to satisfy the demand by shippers for sufficient cars and for cars adapted to the peculiar qualities of certain commodities. See, e.g., *In re Private Cars*, 50 I.C.C. 652, 657 (1918). Private carlines were established to provide those cars, in particular, specialized equipment such as "tank cars for the transportation of oil and other liquids, refrigerator cars for the transportation of fruits and meat products, coal cars, and stock cars." Sharfman, at 120. By the 1880's, privately owned cars were used extensively to transport commodities in interstate commerce. *Id.*; *Private Cars*, 50 I.C.C. at 657, 672.

The interdependent relationship between the railroads and the carlines was cemented by the Hepburn Act of 1906, which amended the Interstate Commerce Act to give the ICC jurisdiction over railroad car service. The Hepburn Act contained two key provisions: it required railroads to furnish safe and adequate car service to meet the needs of the shipping public, and it gave the ICC authority to regulate the compensation and other arrangements between railroads and the companies that supply cars. See, e.g., 49 U.S.C. §§ 11121, 11122 (1988). Pursuant to that authority, the ICC has long required that all cars be accepted by the railroads in interchange service, regardless of ownership.<sup>2</sup> The carlines are thus an integral part of the system through

<sup>2</sup> See *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distribution Rules, & Practices*, 362 I.C.C. 844, 844 (1980) (noting that free interchange of cars became a legal obligation in 1911).



which railroads fulfill their statutory obligation to provide safe and adequate car service.

This interrelationship between the carline and railroad industries means that any economic burden on the carlines also burdens the railroads and their customers. Cars owned by the carlines are subject to a "mileage allowance" paid by the railroads,<sup>3</sup> which includes reimbursement for property taxes paid on the cars. Thus, any discriminatory state taxes imposed on the carlines must inevitably be passed on to the railroads.

Furthermore, a number of the carlines involved in this case are wholly owned by the railroads. These carlines were formed to respond to a surge in demand for highly specialized cars at a time when most individual railroads were unable to invest sufficient capital to remedy equipment shortages. Respondent Trailer Train Company, for example, was organized in 1955 by its owner-railroads to meet the demand for a nationwide fleet of flatcars that could accommodate truck trailers. See *American Rail Box Car Co. & Trailer Train Co.—for Approval of the Pooling of Car Serv. with Respect to Box Cars*, 347 I.C.C. 862, 866 (1974). Trailer Train proved to be so successful that, some nineteen years later, when serious boxcar shortages arose, the industry set up respondent Railbox Company. The role of Railbox, a wholly-owned subsidiary of Trailer Train, is to provide the industry with standard-design, wide-door boxcars of general usefulness, available to all of the company's railroad owners. *Id.* at 867. Respondent Railgon Company, also a wholly-owned subsidiary of Trailer Train, was similarly organized by

<sup>3</sup> See, e.g., *Cancellation of Private Car Allowances on B & O Chicago Terminal R.R. & Indian Harbor Belt R.R.*, 322 I.C.C. 565, 570-71 (1964), *aff'd*, 279 F. Supp. 270 (N.D. Ill.), *aff'd*, 389 U.S. 88 (1967) (mem.).

the railroad industry in 1980 to satisfy a need for standardized, heavy-duty, free-running gondola cars.<sup>4</sup>

The cars of Trailer Train, Railbox, and Railgon are governed by national freight car pooling agreements that ensure that the railroads ultimately pay the cost of ownership, including any discriminatory taxes. Under the ICC-approved contracts by which those respondents provide railroads with cars, all state taxes are paid by the carlines as expenses of operation. These expenses are then passed on directly to the railroads by means of user charges, which cover state taxes and all other expenses.<sup>5</sup>

In short, the carlines are an integral part of the Nation's railway system. Due to the economic relationships between the carline industry and the railroads, discriminatory taxation of carlines directly increases the cost of rail transportation, places railroads at a competitive disadvantage, adversely affects the earnings of railroads, and ultimately increases transportation costs borne by consumers.

### SUMMARY OF ARGUMENT

Congress enacted Section 11503 in response to the longstanding financial crisis of the Nation's railroads. After fifteen years of study, Congress concluded in 1976 that the elimination of state tax discrimination against railroads was essential.

The plain language of Section 11503 reflects comprehensive legislation to end all forms of state tax discrimination against railroads. Subsections (b)(1) through (b)(3) prohibit the then-most-prevalent means by which

<sup>4</sup> See *Investigation of Adequacy of R.R. Freight Car Ownership*, 362 I.C.C. at 871 (citing Finance Docket No. 29121, *Railgon Co. and Trailer Train Co.—Pooling of Car Serv. Regarding Gondola Cars* (not printed), decided February 25, 1980, and affirmed on appeal May 13, 1980)).

<sup>5</sup> See, e.g., *American Rail Box Car Co.*, 347 I.C.C. at 874.

states and localities discriminated against railroad property—imposing higher assessment ratios and higher tax rates for railroad property than that generally applicable to non-railroad property. 49 U.S.C. §§ 11503(b)(1)-(b)(3). But Congress recognized that states were adept at finding more sophisticated means “to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents.” *Western Airlines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 131 (1987). Thus, toward the end of the legislative process, subsection (b)(4) was added as a catch-all provision to ensure the elimination of state tax discrimination in *all* forms. Moreover, as Section 11503 neared passage, Congress *rejected* efforts by certain states to seek greater leeway for tax discrimination against railroad property through “classification” schemes.

Lower federal courts have uniformly and correctly concluded that the catch-all subsection (b)(4) proscribes tax exemptions that discriminate against railroads. 49 U.S.C. § 11503(b)(4). Petitioner relies upon isolated segments of legislative history to question this uniform authority, and to carve out an exception for discriminatory state tax exemptions. Such resort to legislative history is unnecessary and inappropriate where a statute speaks clearly, as does Section 11503. *Oklahoma Tax Comm’n*, 481 U.S. at 461. The statute simply cannot be read in favor of a loophole for discrimination-by-exemption. Petitioner’s reading of the statute would also lead to an absurd result: states would be prohibited from assessment ratio discrimination that is anything more than *de minimis*, but would be given a green light to tax railroad property while fully exempting other commercial and industrial property from taxation.

In determining whether particular state tax exemptions result in discrimination against railroads, subsection (b)(4) requires a comparison of the tax treatment of similar classes of property of other commercial and in-

dustrial taxpayers. For instance, taxation of railroad personal property is to be compared to taxation of the personal property of other businesses. Evaluation of the “overall fairness” of the state’s tax system, as urged by petitioner, has properly been rejected by lower courts. Such an inquiry would put enormous burdens upon courts and litigants seeking to challenge a particular tax.

Once state tax exemptions have been found to violate subsection (b)(4), lower courts should retain the discretion to fashion an appropriate remedy based on the facts and circumstances of the particular case. In deciding whether to grant “proportional” relief or to enjoin the tax in its entirety, courts should properly consider a number of factors. These factors would include, *inter alia*, the extent of the discrimination, the difficulty in crafting a precise form of relief when faced with a particularly complicated web of exemptions, and the state’s past history with respect to state tax discrimination and compliance with Section 11503.

## ARGUMENT

### I. SECTION 11503 PROTECTS RAILROADS AND CARLINES FROM STATE TAX DISCRIMINATION IN ANY FORM

#### A. The Origin and Scope of Section 11503

Efforts by states to extract a disproportionate share of tax revenues from the railroad industry have long been a matter of national concern. As early as 1944, about half of the states admitted to Congress that they were engaged in excessive taxation of railroads. *See* S. Rep. No. 630, 91st Cong., 1st Sess. 4 (1969) (quoting H.R. Doc. No. 160, 78th Cong., 2d Sess. 124-25 (1944)). Indeed, as this Court has noted, Congress itself ultimately concluded that “‘railroads are over-taxed by at least \$50 million each year.’” *Oklahoma Tax Comm’n*, 481 U.S. at 457 (citing H.R. Rep. No. 94-725, at 78 (1975)).



Congressional concern over the impact of discriminatory state taxes was fueled by the drastic financial decline of the railroad industry following the Second World War. That concern was first highlighted in the 1961 "Doyle Report," which laid blame for much of the industry's difficulty on outmoded and burdensome federal and state laws and regulations.<sup>6</sup> The Doyle Report provided the first detailed statement of the impact of state and local tax discrimination against railroads. Over the next fifteen years, the financial instability of the railroads and the need for federal intervention became increasingly acute.<sup>7</sup> State tax discrimination against interstate railroads was a significant element of the problems that led to the near collapse of the rail industry.

In 1976, Congress enacted the first of the two statutes that transformed the regulatory regime and set the stage for the recovery of the railroad industry—the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act").<sup>8</sup> Section 11503 of the 4-R Act declares discrim-

<sup>6</sup> The "Doyle Report" was issued under the staff direction of Major General John P. Doyle pursuant to Senate resolutions. See Senate Comm. on Commerce, Special Study Group on Transportation Policies in the United States, S. Rep. No. 445, 87th Cong., 1st Sess. (1961).

<sup>7</sup> See, e.g., John F. Due, *A Comment on Recent Contributions to the Economics of the Railroad Industry*, 13 J. Econ. Literature 1315, 1315 (1975) (inadequate earnings of the railroad industry a problem "endemic for two decades"); Philip Weinberg, *Working on the Railroad: An Urgent Agenda for Congress*, 20 N.Y.L.F. 731 (1975); George S. Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 Va. L. Rev. 196, 202, 232 (1962) (railroad "financial plight" due in part to discriminatory state taxation).

<sup>8</sup> The Staggers Rail Act of 1980, enacted four years later, provided for even greater relaxation of the regulatory restraints on the railroad industry. Pub. L. No. 96-448, 94 Stat. 1895 (codified, as amended, in scattered sections of 49 U.S.C., 45 U.S.C., and 11 U.S.C.).

inatory state taxation of railroads to be an unreasonable burden on interstate commerce, and authorizes federal courts to provide relief from it.<sup>9</sup> This was no accident; Congress viewed the elimination of discriminatory taxes on railroads as essential to restoring their financial stability.<sup>10</sup>

When, after fifteen years of study, Congress enacted Section 11503, it legislated comprehensively to end all forms of state tax discrimination against railroads. The legislation was intended "to put an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district." S. Rep. No. 630 at 2 (citation omitted). The structure of the statute reflects this intention.

The statute focuses first on the then-most-prevalent means by which states and localities were discriminating against railroad property. Congress noted that at that time, states most frequently accomplished discriminatory taxation either by taxing railroad property at higher rates

<sup>9</sup> The original language of Section 306 of the 4-R Act, first codified at 49 U.S.C. § 26c (1976), was slightly altered in its 1978 recodification at 49 U.S.C. § 11503. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* That recodification, however, merely "restate[d]" existing law and "may not be construed as making a substantive change." *Id.* § 3(a), 92 Stat. at 1446. The original language thus controls. See *Oklahoma Tax Comm'n*, 481 U.S. at 457 n.1. For the convenience of the Court, AAR will generally refer to the recodification, 49 U.S.C. § 11503, but will discuss the original language of Section 306 where appropriate.

<sup>10</sup> Section 11503 has been used as a model for measures designed to protect other interstate carriers. See Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (codified at 49 U.S.C. § 11503a (1988)) (trucking companies); Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1102, 1122 (codified at 49 U.S.C. § 11503a (1988)) (bus companies); and Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, tit. 5, § 532, 96 Stat. 671, 701 (codified at 49 U.S.C. app. § 1513(d) (1988)) (airlines).



than other commercial and industrial property, or by varying the assessment ratios. *See* S. Rep. No. 1085, 92d Cong., 2d Sess. 5 (1972); S. Rep. No. 630 at 6; S. Rep. No. 1483, 90th Cong., 2d Sess. 2 (1968). Subsections (b)(1) through (b)(3) thus explicitly prohibit states from imposing higher assessment ratios and higher tax rates for railroad property than those generally applicable to non-railroad property.<sup>11</sup>

But Congress did not stop there. Recognizing that it would do little good to prohibit the then-current, relatively straightforward techniques of discrimination if this simply led the states to find more sophisticated means of accomplishing the same result, Congress added a fourth subsection, which made it unlawful to "impose another tax that discriminates against a rail carrier." 49 U.S.C. § 11503(b)(4). As originally enacted, this subsection prohibited the "imposition of any other tax which results in discriminatory treatment" of railroads. § 306(1)(d), Pet. App. 39. This last prohibition—the catch-all subsection (b)(4)—was added toward the end of the long legislative process that preceded the enactment of Section 11503.<sup>12</sup> Its inclusion in the statute reflects Congress's

<sup>11</sup> Specifically, subsections (b)(1) through (b)(3) forbid a state or locality to:

- (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
- (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
- (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction . . . .

49 U.S.C. §§ 11503(b)(1)-(b)(3).

<sup>12</sup> A provision similar to subsection (b)(4) first appeared in H.R. 12891, in 1974. *Hearings Before the House Committee on*

recognition of the wide array of means through which states could achieve tax discrimination against railroads, and its determination that such discrimination be ended, however it might be accomplished.<sup>13</sup>

As the fifteen-year struggle toward enactment indicates, Section 11503 was not willingly accepted by the states, many of which had long depended on disproportionate tax revenues from railroads and were reluctant to face the prospect of either cutting their budgets or increasing taxes on their own residents. Congress did not turn a totally deaf ear to their pleas, but the relief it provided the states was extremely limited. First, to protect the states' short-term fiscal interests, Congress gave them a three-year grace period to bring their practices into compliance, § 306(2)(b), Pet. App. 40. In addition, to protect the states against a multitude of lawsuits over minute variations in taxes, Congress specified more than a five percent differential would be required to support relief based on assessment ratio differentials. 49 U.S.C. § 11503(c). Other requests to relieve the states from the full force of the antidiscrimination mandate—including an exception to permit states to "classify" railroad property in ways that were "reasonable" but different from

*Interstate and Foreign Commerce and the Subcommittee on Transportation and Aeronautics*, 93d Cong., 2d Sess., Vol. 16, at 24 (1974).

<sup>13</sup> Because Congress was dissatisfied with the remedies available in state courts, Section 11503 granted the federal courts jurisdiction over claims of state tax discrimination against railroad property, without regard to the amount in controversy or the citizenship of the parties and notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Congress concluded that the Tax Injunction Act had deprived railroads of access to federal courts, but that states did not provide an adequate state court remedy. *See, e.g.*, S. Rep. No. 630 at 6-7. In a number of states, for example, railroads were required to bring suit against every county in which the carrier operated because state law required suit against the tax collectors rather than the tax assessors. *See* H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975); S. Rep. No. 1483 at 6.

other taxpayers—were soundly rejected. S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976).

After the enactment of Section 11503, some states promptly brought their tax laws into compliance with the statute. Others, however, continued to seek ways to tax railroads disproportionately. One of the most common maneuvers was to equalize tax rates and assessment ratios—but then simply to overvalue the railroad property, so that it continued to yield higher tax revenues. This ploy was struck down by this Court under subsections (b)(1) through (b)(3) in *Oklahoma Tax Comm'n*, 481 U.S. 454, which held that the statute encompasses discrimination stemming from the overassessment of railroad property, regardless of discriminatory intent.

The lower courts have dealt with a myriad of techniques designed to perpetuate excessive taxation of railroads, enjoining them as a violation of Section 11503. This has included, for example, a Wisconsin occupational tax on owners and operators of “iron ore concentrates docks” that affected only railroads because they were the only operators of such docks, *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); a private car tax imposed by Missouri solely on freight line companies, *Trailer Train Co. v. State Tax Comm'n of Mo.*, 929 F.2d 1300 (8th Cir.), *cert. denied*, 112 S. Ct. 169 (1991); a Louisiana tax on the intrastate gross receipts of “public utilities” which included only railroads and a few other business taxpayers, *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 370 (5th Cir. 1987); a Kentucky law that classified railroad cars as public utility property and taxed them at a higher rate of assessed value, *General Am. Transp. Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986); Iowa’s taxation of railroad personal property without benefit of rollbacks and credits accorded to other personal property, *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985); a Florida law according tax benefits to owners of other commercial and industrial property, but not to railroads, *Louisville & N.*

*R.R. v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984); laws assessing railroad real property annually, while other commercial and industrial real property was assessed less frequently, *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984) (Kansas); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (North Carolina); Alabama’s license tax on railroads, *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); North Dakota’s taxation of railroad personal property but not other commercial personal property, as well as discriminatory assessment of railroad property, *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Iowa’s overvaluation of railroad property, *Burlington N. R.R. v. Bair*, 648 F. Supp. 91 (S.D. Iowa 1986); Arizona’s improper classification of “other” commercial and industrial property relative to railroad property, *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237, 1240 (D. Ariz. 1983); and a Louisiana law classifying railroad property as “public service” property and assessing it at a higher percentage of true market value, *Louisville & N. R.R. v. Louisiana Tax Comm'n*, 498 F. Supp. 418, 420 (M.D. La. 1980).

In all of these cases, the lower federal courts have correctly concluded that the purpose of Section 11503 is “to prevent tax discrimination against railroads in any form whatsoever.” Pet. App. 12 (citations omitted), and have struck down the various techniques by which states have continued to seek to extract disproportionate tax revenues from railroads.<sup>14</sup> What is now before this Court

<sup>14</sup> See *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416-17 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (citing *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 210 (8th Cir. 1981) and *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985)); see also *Southern Ry. v. State Bd. of Equalization of Ga.*, 715 F.2d 522, 528 (11th Cir. 1983) (Section 11503 forbids discriminatory state taxation “in all of its guises”), *cert. denied*, 465 U.S. 1100 (1984).



is simply another one of those techniques—the imposition of ostensibly equal taxes coupled with the exemption of substantial amounts of non-railroad property that would otherwise be subject to those taxes.<sup>15</sup>

**B. Subsection (b)(4), Which Prohibits “Any Other Tax” That Results in Discriminatory Treatment of Railroads, Prohibits Discriminatory Property Tax Exemptions**

While subsections (b)(1) through (b)(3) proscribe specific aspects of assessment ratio and tax rate discrimination, subsection (b)(4), as originally enacted, broadly prohibits “any other tax” that results in discriminatory treatment of rail carriers.<sup>16</sup> Consistent with the statute’s plain language, all of the lower federal courts that have addressed the issue have held that this catch-all provision encompasses *all* other state taxes that result in the discriminatory treatment of railroads.<sup>17</sup> That conclusion is

<sup>15</sup> The Ninth Circuit’s opinion demonstrates that 67% of non-railroad *personal* property in Oregon is exempt from taxation. This figure is derived by dividing the amount of exempt personal property (\$9.7 billion) by the amount of exempt personal property plus the amount of taxed personal property (\$9.7 billion plus \$4.8 billion). See Pet. App. 18 n.4.

<sup>16</sup> Section 11503(b)(4), as originally enacted, prohibited “any other tax *which results in* discriminatory treatment of a common carrier by railroad.” § 306(1)(d), Pet. App. 39 (emphasis added). The recodification prohibits “another tax that discriminates against a rail carrier.” 49 U.S.C. § 11503(b)(4). Since it was the actual language enacted by Congress, the original language controls. See *supra* note 9.

<sup>17</sup> See, e.g., *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); *Department of Revenue of Fla. v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987), *cert. denied*, 112 S. Ct. 169 (1991); *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 373 (5th Cir. 1987); *Richmond, F. & P. R.R. v. Department of Taxation of Va.*, 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

plainly correct, since any other interpretation would open a loophole in the statute that Congress did not intend.

Despite the unambiguous language of the statute, petitioner and the *amici* supporting petitioner argue that subsection (b)(4) was not intended to cover tax exemptions that discriminate against railroads. To support that argument, they rely on cases finding that subsections (b)(1) through (b)(3), which prohibit tax rate and assessment ratio discrimination, do not protect against the exemption of non-railroad property from tax, because only property that is “subject to a property tax levy” is included in the comparison class under these subsections.<sup>18</sup> But those cases are wholly irrelevant to subsection (b)(4), which contains no such limiting language. Indeed, the absence of the phrase “subject to a property tax levy” in subsection (b)(4)—in contrast to its presence in subsections (b)(1) through (b)(3) by the use of the defined term “commercial and industrial property”—only confirms that Congress did not intend such a limitation on subsection (b)(4) challenges.

Petitioner can point to no legislative history to support its argument that Congress intended to carve out such an exception from a comprehensive statute and the all-inclusive “any other tax” language. As the Fourth Circuit has recognized, “nothing in the committee reports, debates, or other legislative history focuses specifically on the purpose” of subsection (b)(4). *Richmond, F. & P. R.R. v. Department of Taxation of Va.*, 762 F.2d 375, 379 (4th Cir. 1985); *cf. Oklahoma Tax Comm’n*, 481 U.S. at 461 (finding an inquiry into the legislative history of Section 11503 “inconclusive and irrelevant”).

<sup>18</sup> See, e.g., *Department of Revenue of Fla. v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986); *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *ACF Indus., Inc. v. Arizona*, 714 F.2d 93, 94 (9th Cir. 1983).



Petitioner's interpretation of Section 11503 would in effect impose a major limitation on the statute that Congress considered and rejected. During the legislative development of Section 11503, Congress came under heavy pressure from the states to permit them to "classify" property in "reasonable" ways that might not treat railroads equally with other, in-state taxpayers, but an amendment to that end was voted down.<sup>19</sup> Exemption, of course, is simply classification by another name, and in an extreme form. To permit exemption discrimination under Section 11503 would be to enact judicially the very sort of amendment that Congress rejected as inconsistent with the purpose of the statute.

The Solicitor General has urged this Court to remand this case to permit Oregon an opportunity to "justify" its discrimination by showing "significant differences between the two classes" of property. U.S. Br. at 18. This view directly conflicts with the original language of Section 11503, which conclusively determined that state tax discrimination constitutes "unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." § 306(1), Pet. App. 39; *see also* 49 U.S.C. § 11503(b). Congress thus provided no statutory authority for permitting a state to demonstrate in a particular case that discrimination was "reasonable" or "just." This view is solidified by the original language of subsection (b)(4), which prohibited "any other tax which *results in* discriminatory treatment" of railroads. § 306(1)(d), Pet. App. 39. As this Court recognized in *Oklahoma Tax Comm'n*, 481 U.S. at 463, "Subsection (b) speaks only in terms of

<sup>19</sup> S. Conf. Rep. No. 595 at 166; *see also* *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) ("Congress rejected a proposed [version of Section 11503] which would have granted an exemption to states with a constitution providing for a 'reasonable classification of property.'"); *cf.* *Trailer Train Co. v. State Tax Comm'n of Mo.*, 929 F.2d 1300, 1303 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 169 (1991); *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 551-52 (4th Cir. 1986); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer to the intent of the actor." While this Court was specifically addressing an intent requirement for overvaluation claims under subsection (b)(1), the reasoning is equally applicable here: the results test adopted by Congress left no room in subsection (b)(4) for an inquiry into intent or justification.

Nor is there any basis for petitioner's argument that subsection (b)(4) prohibits only discriminatory taxes enacted "in lieu" of property taxes. The AAR representative on whose congressional testimony petitioner relies addressed the problem of "in lieu" taxes simply because this was the form of discrimination, apart from tax rate and assessment ratio discrimination, that was then most prevalent. But there is no indication that his concerns were limited to this particular discrimination technique. Moreover, while the House Report's characterization of subsection (b)(4) would have limited the provision to "in lieu" taxes, the Conference Report rejected that characterization. S. Conf. Rep. No. 595 at 165-66.

In any event, petitioner's reliance on isolated snippets of legislative history cannot be reconciled with the broad statutory language that Congress actually used. This Court has frequently recognized that "unless exceptional circumstances dictate otherwise," when the Court "find[s] the terms of a statute unambiguous, judicial inquiry is complete." *Oklahoma Tax Comm'n*, 481 U.S. at 461 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see also* *Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992). Congress expressly prohibited "any other tax" that "results in discriminatory treatment" of railroads. § 306(1)(d), Pet. App. 39. This language is unambiguous and clearly cannot support any inference of an intent to limit subsection (b)(4) to discriminatory "in lieu" taxes. *See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186-87 (7th Cir. 1991) (collecting cases).

Section 11503 protects railroads from excessive and unfair state taxation by tying their fate to that of local taxpayers, who have the political power to oppose oppressive taxes. As this Court pointedly noted in *Western Airlines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 131 (1987), Section 11503 was designed to curb the "temptation [on the part of state and local governments] to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." If the vast majority of other commercial and industrial property may be exempted from the relevant taxes without also exempting the property of railroads, the political connection is broken and the statute's protection against discrimination is lost.<sup>20</sup> Were this Court to interpret subsection (b)(4) as not covering discrimination resulting from exemption of other commercial and industrial property, it would open a loophole large enough to engulf the statute.<sup>21</sup>

Petitioner's interpretation is also nonsensical. Petitioner contends that Section 11503 prohibits assessment ratio discrimination that is anything more than *de min-*

<sup>20</sup> Subsection (b)(4) has generally been interpreted to require comparison with the commercial and industrial taxpayers or property generally. There are, however, cases in which a violation of the subsection has been found to occur because railroads, when compared to other modes of transportation, have been put at a competitive disadvantage by the particular tax at issue. See *Burlington N. R.R. v. Commissioner of Revenue*, No. 5703, 1993 WL 1856 (Minn. Tax Ct. Jan. 4, 1993); *National R.R. Passenger Corp. v. State Bd. of Equalization of Cal.*, 652 F. Supp. 923 (N.D. Cal. 1986); *Atchison, T. & S.F. Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984); *Burlington N. R.R. v. Triplett*, 682 F. Supp. 443 (D. Minn. 1988).

<sup>21</sup> As this Court has often held, a statute may not be interpreted in a way that would make it ineffective. See, e.g., *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981); *United States v. Shirey*, 359 U.S. 255, 259-60 (1959); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940); *Graham & Foster v. Goodcell*, 282 U.S. 409, 421-22 (1931).

*imis*, but permits wholesale discrimination through exempting other commercial and industrial property altogether. This ignores the reality of discriminatory exemptions. Taxing railroad property while exempting non-railroad commercial and industrial property from taxation is perhaps the ultimate form of discrimination. If discrimination through selective exemption is permitted—particularly in the present era of intense fiscal pressures on state and local government—the result will be a rapid return to the old days of unbridled tax discrimination against railroads.

The various ways in which exemptions can be manipulated to perpetuate tax discrimination against railroads are well illustrated by cases that have come before the lower federal courts. For example, in *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d at 210, North Dakota had adopted a statute that exempted the personal property of locally assessed businesses, but included personal property and trade fixtures in the assessment of centrally assessed railroad property. As the Eighth Circuit correctly noted, the statute "impose[d] a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class." *Id.*

In *Burlington N. R.R. v. Bair*, 766 F.2d at 1223-25, Iowa had "rolled back" assessed values of personal property and granted tax credits to non-railroads, effectively exempting 95% of personal property owners from taxation. *Id.* at 1224. Railroad property, however, was centrally assessed, without any differentiation between real and personal property—and without any rollbacks. The Eighth Circuit had no difficulty in concluding that "Iowa's classification scheme result[ed] in obvious discrimination," since railroads could not obtain the rollbacks or tax credits. *Id.*

In addition to these reported decisions, there are a number of cases currently pending in which exemptions



that discriminate against railroads have been challenged. For example, the Atchison, Topeka and Santa Fe Railroad has brought a subsection (b)(4) challenge to Missouri's imposition of ad valorem taxes on railroad personal property, while not taxing as much as 75% of other commercial and industrial personal property. The district court has preliminarily enjoined the collection of railroad ad valorem taxes, and has stayed the action pending this Court's decision in this case. See *Atchison, T. & S.F. Ry. v. Missouri State Tax Comm'n*, Nos. 90-4391-CV-C-9, 91-1064-CV-W-3, and 92-1148-CV-W-1 (W.D. Mo.).

If discrimination resulting from exemptions were held to be outside the bounds of Section 11503, there is little doubt that some states would rush to exploit the new opportunity to discriminate. Indeed, attempts to use exemptions in this fashion have already occurred. In Kansas, for example, the railroads initially challenged discrimination arising from the state's failure to assess railroad property at the same percentage of true market value as other commercial and industrial property and from the overvaluation of rail transportation property.<sup>22</sup> The railroads filed suit for each tax year between 1980 and 1988, and those suits were ultimately settled on the basis of injunctions that granted relief from that assessment ratio discrimination for each year.<sup>23</sup> In 1986, Kansas adopted

<sup>22</sup> See, e.g., *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495 (10th Cir. 1984); *Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255 (10th Cir.), on remand, 531 F. Supp. 220 (D. Kan. 1981).

<sup>23</sup> See *Atchison, T. & S.F. Ry. v. Duncan*, Nos. 80-4172, 80-4173, 80-4176, 80-4181, 80-1690, 81-1495, 82-1561, 82-1562, 82-1596, 83-4221, 83-4204, 84-4334 (D. Kan. Oct. 4, 1984) (Settlement Orders and Permanent Injunctions) (tax years 1980 through 1984); *Atchison, T. & S.F. Ry. v. Duncan*, No. 85-4269R (D. Kan. June 18, 1985) (Settlement Order and Permanent Injunction) (tax year 1985); *Atchison, T. & S.F. Ry. v. Duncan*, No. 86-4173-R (D. Kan. May 29, 1986) (Settlement Order and Permanent Injunction) (tax year 1986); *Atchison, T. & S.F. Ry. v. Duncan*, No. 87-4156R (D. Kan. May 27, 1987) (Settlement Order and Permanent Injunction)

a constitutional amendment providing for the classification of property for purposes of taxation, effective in tax year 1989. Kan. Const. art. XI, § 1. Based upon that amendment and the enactment of significant statutory exemptions in 1989, no ad valorem taxes are imposed on at least 80% of the aggregate value of commercial and industrial personal property. Since 100% of railroad personal property was subject to taxation, plaintiffs challenged these exemptions as discriminatory under subsection (b)(4). Again, plaintiffs were forced to initiate a suit each tax year, beginning with tax year 1989. And each year, the parties have settled the suits, agreeing that 80% of the railroad personal property would not be taxed.<sup>24</sup>

The lower courts thus have wisely rejected the loophole that petitioner urges this Court to open. Indeed, in addition to the court below, Pet. App. 9-13, every other federal appellate court to consider the issue has concluded that subsection (b)(4) proscribes discriminatory tax exemptions. See *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); *Department of Revenue of Fla. v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington N. R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v.*

(tax year 1987); *Atchison, T. & S.F. Ry. v. Duncan*, No. 88-4110-R (D. Kan. May 23, 1988) (Settlement Order and Permanent Injunction) (tax year 1988).

<sup>24</sup> *Burlington N. R.R. v. Rolfs*, No. 89-4124-R (D. Kan. Aug. 11, 1989) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax years 1989 and 1990); *Burlington N. R.R. v. Beshears*, No. 91-4109-R (D. Kan. June 13, 1991) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax year 1991); *Burlington N. R.R. v. Beshears*, No. 92-4120-C (D. Kan. June 1, 1992) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax year 1992); *Burlington N. R.R. v. Parrish*, No. 93-4119-DES (D. Kan. May 27, 1993) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax year 1993).



*State Bd. of Equalization of N.D.*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981). Even though the cases involving discriminatory tax exemptions have arisen under widely differing state statutes, the conclusion has been uniform: subsection (b)(4) proscribes state tax exemptions that result in discriminatory treatment.<sup>25</sup>

Any definition of discrimination under Section 11503 must serve the broad remedial purposes of the statute. The history, language, and entire structure of the statute manifest its intent to prohibit all forms of state tax discrimination against railroads. The only reasonable interpretation of it is that subsection (b)(4) is violated whenever railroad property is in fact subjected to significantly disparate tax treatment. This would occur, for example, in the instant case, where a substantial amount of non-railroad personal property is exempt from taxation, but railroad personal property is not. Without this protection, Congress's goal of eliminating all forms of state tax discrimination against railroads would be defeated.

<sup>25</sup> The conclusion that subsection (b)(4) applies to discriminatory tax exemptions has followed from the conclusion that subsections (b)(1) through (b)(3) do not reach such exemptions. See *supra* note 18. But this interpretation of subsections (b)(1) through (b)(3) is not necessarily dictated by their text, and certainly not by their remedial purpose. Indeed, under statutes that are modeled on Section 11503 but do not include a catch-all such as subsection (b)(4), courts have held tax exemption discrimination to be prohibited. *E.g.*, *Northwest Airlines, Inc. v. State Bd. of Equalization of N.D.*, 358 N.W.2d 515 (N.D. 1984); cf. *Arkansas-Best Freight Sys., Inc. v. Cochran*, 546 F. Supp. 915 (M.D. Tenn. 1982). In any event, if subsections (b)(1) through (b)(3) do not apply, then subsection (b)(4) must.

## II. A DETERMINATION WHETHER PARTICULAR EXEMPTIONS RESULT IN DISCRIMINATION AGAINST RAILROADS MUST BE BASED ON A COMPARISON OF THE TAX TREATMENT OF SIMILAR CLASSES OF PROPERTY OF OTHER COMMERCIAL AND INDUSTRIAL TAXPAYERS

As a fall-back from petitioner's theory that discrimination resulting from exemptions is not prohibited by Section 11503 at all, petitioner urges that the discriminatory effect of exemptions should be decided through a wide-ranging evaluation of the "fairness" of the state's entire tax system. Petitioner's obvious hope is that through such an exercise, Section 11503 litigation could be rendered virtually unmanageable—and thus ineffective. This effort to force the courts into an evaluation of the entire tax structure of a state has been rejected by the lower courts for sound and valid reasons, and should be rejected for the same reasons by this Court.

This Court addressed an analogous issue in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143-47 (1979), where it considered whether a state tax on electricity, which in effect applied only to electricity generated in New Mexico and sold out of state, violated a federal statute that prohibited taxes on electricity that were discriminatory against out-of-state consumers. In attempting to defend the electricity tax, New Mexico argued that the state's entire tax structure should be considered in determining whether there was discrimination. This Court unanimously rejected that argument:

[T]he federal statutory provision is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State. . . . To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also the expressed intent of Con-

gress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates that federal statute.

*Id.* at 149-50.

Similarly, Section 11503(b)(4) does not call for an examination of the state's entire tax system in order to determine whether an exemption is discriminatory. To the contrary, the structure of subsection (b)(4)—with its focus on individual taxes that result in discrimination—requires that any meaningful analysis of the discriminatory effect of an exemption be tightly focused on the tax at issue.<sup>26</sup> As Congress recognized, Section 11503 was not intended to interfere with state distinctions between traditional broad categories of property so long as railroad property was treated the same as other commercial and industrial property within the same category.<sup>27</sup> Indeed, these broad categories of property—real property, tangible personal property, and intangible personal property—were meant to serve as the benchmarks under subsection (b)(4) for determining whether railroad property is taxed the same as other commercial and industrial property within the same category. This means that taxes and exemptions on the personal property of railroads must be compared to taxes and exemptions on the personal property of other commercial and industrial taxpayers; taxes on railroad real property must be compared to taxes and exemptions on the real property of other commercial and industrial taxpayers; and various other taxes must be compared to their counterparts.

<sup>26</sup> Subsection (b)(4), as originally enacted, also used the term "any other tax," not a term such as "any other tax system" or "any other set of taxes." § 306(1)(d), Pet. App. 39.

<sup>27</sup> See S. Rep. No. 1483 at 10-11 (Section 11503 was "not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of real property, tangible property, and intangible property").

Indeed, the Eighth Circuit flatly rejected the same sort of argument petitioner has made here in a case challenging North Dakota's exemption of the personal property of locally assessed businesses under subsection (b)(4):

North Dakota's rationalization that they have an equitable tax system because of a business privilege tax is nothing more than an attempt to resurrect, in a different form, an exemption from [Section 11503] for states with a 'reasonable classification of property.' Congress did not accept the proposal and this court will not accept it.

*Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d at 210.

In challenges to other forms of tax discrimination brought under subsection (b)(4), the lower courts have recognized that requiring an inquiry into the state's entire tax structure would place an enormous burden upon courts and an impermissible burden upon railroads seeking to challenge a particular tax. For example, in *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), the Seventh Circuit declined to review Wisconsin's entire tax system in a subsection (b)(4) challenge to the state's occupational tax on owners and operators of "iron ore concentrates docks," which affected only railroads because no other businesses operated these docks. As that court noted, it is "unrealistic to think a court could figure out whether different taxes on other activities might offset the burden on the railroad industry of a tax limited to railroads." *Id.* at 1187-88. The Seventh Circuit correctly concluded that subsection (b)(4) revealed "a congressional desire that courts avoid the thicket of incidence analysis," and refused to consider "whether the state's tax system as a whole avoids burdening the railroad industry disproportionately." *Id.* at 1188.

In *Kansas City S. Ry. Co. v. McNamara*, the Fifth Circuit similarly rejected Louisiana's argument that the



court should consider "the overall tax burden of the railroads" and "compare that burden with all other commercial and industrial taxpayers" in considering a subsection (b)(4) challenge to the state's gross receipts tax on railroads. 817 F.2d at 377. The Fifth Circuit recognized the "profound problems" with such an approach:

Determining the intrinsic economic fairness of a tax system to a particular taxpayer is a paradigm of the kind of polycentric problem for which courts are ill-suited. In effect, we would have to determine the fairness of the tax system to *each and every* taxpayer in order to decide whether it was fair to *any one* of them. . . . Aside from the theoretical difficulty of assessing the basic fairness of a tax system, an attempt to make the assessment would be extraordinarily costly both to the parties and the judicial system.

*Id.*<sup>28</sup>

These decisions of the lower federal courts are clearly correct. Just as it says, the original language of subsection (b)(4) prohibits *any* tax that discriminates against railroads. § 306(1)(d), Pet. App. 39. As the Fifth Circuit aptly observed, there "is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state." *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d at 377.

<sup>28</sup> See also *Trailer Train Co.*, 929 F.2d at 1303 (concluding in subsection (b)(4) challenge to private car tax imposed solely on freight line companies that "it is not within our discretion to analyze the disputed tax in the context of Missouri's over-all tax structure"); *Alabama Great S. R.R. v. Eagerton*, 541 F. Supp. 1084 (M.D. Ala. 1982) (concluding that the entire tax structure should not be considered in subsection (b)(4) challenge to license tax on railroads), *on remand from*, 663 F.2d 1036 (11th Cir. 1981).

### III. THE APPROPRIATE REMEDY FOR RECTIFYING STATE TAX DISCRIMINATION AGAINST RAILROADS SHOULD BE LEFT TO THE DISCRETION OF THE LOWER COURTS

Once a tax exemption has been found to violate subsection (b)(4), lower courts should have the discretion to fashion relief that results in the elimination of discrimination based on the facts and circumstances of the case. Given the great variety of discriminatory exemptions, AAR urges that no blanket form of relief be prescribed, and that this Court leave the lower courts sufficient discretion to deal effectively with the individual circumstances that come before them.

The lower federal courts have in fact tailored the remedy to the character of the violation in cases involving discriminatory exemptions. In *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d at 210, for example, the Eighth Circuit was faced with a statute that exempted the personal property of locally assessed businesses from taxation, but included personal property and trade fixtures in the assessment of railroad property subject to tax. Noting that "North Dakota has had a long history of tax discrimination against railroads," the court ordered the full exemption of railroad personal property—which was precisely the treatment other commercial and industrial property owners enjoyed. *Id.*

In *Burlington N. R.R. v. Bair*, 766 F.2d at 1223-25, Iowa gave 95% of other commercial and industrial property owners an exemption for personal property by means of "roll-backs" and tax credits, but failed to provide any such roll-backs or credits for railroads on the ground that its assessment of railroad property did not differentiate between real and personal property. In determining the relief to be afforded the railroads, the court concluded on the basis of the evidence before it that one-half of the railroad's property should be characterized as personal property and ordered that it be made subject to the same



roll-backs and tax credits accorded other commercial and industrial personal property. *Id.* at 1224-25.

In *Leuenberger*, 885 F.2d at 418, the Eighth Circuit enjoined the collection of the challenged tax on personal property on the basis of a finding that more than 75% of other commercial and industrial personal property was exempt. As that court reasonably concluded, "[w]hen three-fourths of the commercial and industrial property in the state is not taxed because personal property used in agriculturally-related business is exempt, railroads are discriminated against if their personal property is taxed." *Id.*

In other cases, courts have entered stipulated orders that award the railroads a form of "proportional" exemption similar to that accorded by statute to other commercial and industrial property. See, e.g., *Burlington N. R.R. v. Parrish*, No. 93-4119-DES (D. Kan. May 27, 1993) (granting plaintiffs an 80% exemption from personal property taxation in light of Kansas' 80% non-taxation of all other commercial and industrial property). These cases illustrate the wide variety of circumstances in which discrimination via exemption can be found and the importance of leaving the lower courts with a substantial measure of discretion in fashioning the relief appropriate for a particular case.

This is not to say, of course, that the lower courts should be left without standards. Indeed, the cases to date suggest several factors that are appropriate for consideration when the district court is devising a remedy for discriminatory exemptions. One factor clearly should be the extent of the discrimination. An egregious form of discriminatory exemptions, such as that before the Eighth Circuit in *Ogilvie*, may well justify an absolute injunction. Similarly, a particularly complicated web of exemptions, which makes the crafting of a more precise form of relief exceptionally difficult, may justify an injunction against collection of the tax from the railroads—until the legislative body has devised a non-discriminatory system of taxes

and exemptions. Finally, a state's record of past discriminatory taxation against railroads should be an appropriate factor for consideration in deciding the nature of the relief to be awarded. Where a state has a history of recalcitrance, pursuing progressively more complicated efforts to continue collecting a disproportionate share of tax revenue from the railroads, an injunction against the current exemption-based discrimination may well be justified on that basis alone to compel adherence to the mandate of Section 11503.

In this case, based on the stipulated facts, the court of appeals concluded that the discriminatory Oregon tax should be enjoined. That conclusion was well within its discretion and consonant with the statutory mandate and the decisions of other lower courts. Indeed, the facts in this case closely parallel those in *Leuenberger*, where the Eighth Circuit ordered the same relief.

As Congress recognized, Section 11503 was designed to serve as a "plain, speedy, and effective remedy to eliminate discriminatory tax assessment and classification practices." S. Rep. No. 1483 at 7. In light of the wide range of possible discriminatory exemptions, it is essential that the lower courts retain the discretion to fashion an appropriate remedy based on the facts and circumstances of each individual case, in order to ensure railroads the "effective remedy" Congress envisioned.

**CONCLUSION**

For the foregoing reasons, AAR urges the Court to hold that Section 11503(b)(4) prohibits state tax discrimination against railroads that results from exemptions, and to hold that the court below acted within its discretion in fashioning the relief granted.

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